6th Bench Copy

THE
INDIAN LAW REPORTS

ALLAHABAD SERIES

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT ALLAHABAD AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT.

REPORTED BY:

Privy Council ... ... A. M. TALBOT, *Inner Temple.*

High Court, Allahabad ... B. K. MUKERJEE, M.A., LL.B., *Advocate, High Court.*

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IAD.

JUDGES OF THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

1928.

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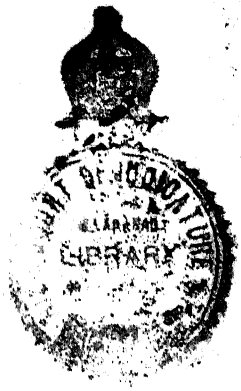
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APPELLATE CIVIL.

Before Mr. Justice Lindsay and Mr. Justice Sulaiman.

TULSHI RAM (PLAINTIFF) *v.* BISHNATH PRASAD AND OTHERS (DEFENDANTS).*

1927
February, 23.

Hindu law—Joint Hindu family—Son's liability for father's debts—Defences to suit by creditor—Immorality of father or want of legal necessity—Burden of proof—Antecedent debt.

Once a mortgagee has established that the loan advanced by him to the mortgagor was for payment of antecedent debts, it is no longer incumbent upon him to prove that these antecedent debts were in themselves for necessity. In order to get rid of his liability, the burden then lies on the son to establish that those antecedent debts were tainted with immorality or illegality. *Maharaj Singh* v. *Balwant Singh* (1), referred to. *Nanomi Babuasin* v. *Modhun Mohun* (2), and *Brij Narain* v. *Mangal Prasad* (3), followed.

Mere proof of the general immoral habits of a mortgagor at the time the debts were advanced is insufficient to justify the court in presuming that the debts were so tainted. The connexion between the immorality and the debt must be proved before the debt can be vitiated. *Sri Narain* v. *Lala Raghubans Rai* (4), referred to. *Babu Singh* v. *Bihari Lal* (5), *Narendra Bahadur Singh* v. *Abdul Haq* (6), and *Dhullipallia* v. *Kuppa Venkatakrishnayya* (7), followed.

THE facts of this case were as follows :—

There were two suits, the first by Tulshi Ram mortgagee to enforce a mortgage executed by Bishnath Prasad

*First Appeal No. 38 of 1924, from a decree of Raja Ram, Additional Subordinate Judge of Ballia, dated the 29th of September, 1923.

(1) (1905) I.L.R., 28 All., 508.
(2) (1885) I.L.R., 13 Calc., 21.
(3) (1923) I.L.R., 46 All., 95.
(4) (1912) 17 C.W.N., 124.
(5) (1908) I.L.R., 30 All., 156.
(6) (1915) 30 Indian Cases., 216.
(7) (1918) 36 M.L.J. 296; 58 Indian Cases., 797.

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in 1917 and the other a suit for a declaration by Bishnath Prasad's minor son that a simple money decree of 1921 obtained by Tulshi Ram was not binding on the plaintiff. The case for the minor son in both the suits, apart from a denial of consideration, was that Bishnath Prasad was a person of grossly immoral character and that the money taken by him, if at all, was spent on immoral objects. On the other hand Tulshi Ram's position was that the money had been acquired for purposes of legal necessity, family business and for the payment of antecedent debts. In Tulshi Ram's suit the court of first instance found that the full consideration did pass and that the money was taken to a large extent for payment of previous debts, and passed a personal decree against Bishnath Prasad. That court, however, held that the burden of proving that the previous debts were of a binding character was on Tulshi Ram and that he failed to discharge that burden. His claim to enforce the mortgage was, therefore, disallowed. In the suit brought by the minor son the same court held that the burden of proving that the antecedent debts were contracted for illegal and immoral purposes lay on the minor and that he had failed to discharge it. That suit was accordingly dismissed. Both parties filed cross-appeals.

On these appeals—

Babu *Piari Lal Banerji*, Pandit *Narmadeshwar Prasad Upadhiya* and Munshi *Brij Behari Lal*, for the appellant mortgagee.

Dr. *Surendra Nath Sen*, Dr. *Kailas Nath Katju* and Mr. *B. Malik*, for the respondents debtors.

The judgement of the Court (LINDSAY and SULAIMAN, JJ), after stating the facts as above, thus continued—

We propose to take up F. A. No. 504 of 1923 first. The subject of controversy in this case is the mortgage-deed, dated the 14th of April, 1917, for Rs. 38,000. As

stated above, the court below has found that the whole of the consideration money has been paid by Tulsi Ram. The mortgage-deed recited that Rs. 17,700 were set off on account of debts due to Tulshi Ram himself and had been required for family necessity and for business under *bahi khata* and *sarkhats*, and that the balance of Rs. 20,300 was taken in cash from the mortgagee for payment of previous valid debts due to other creditors. According to the plaintiff's account books Rs. 17,700 were due to him on previous accounts, including large sums advanced shortly before the mortgage-deed to pay off certain previous creditors. The cash consideration of Rs. 20,300 was actually paid to Bishnath Prasad before the sub-registrar. That the first portion of the consideration was actually due to Tulshi Ram is not now disputed before us. There is thus no suggestion that Tulshi Ram has played any trick and taken the mortgage-deed for an inflated amount. In fact the learned Subordinate Judge has passed a personal decree for the whole amount together with full interest against the executant, Bishnath Prasad, who has submitted to the decree and has not chosen to appeal from it. It is, therefore, quite clear that the payment of the full consideration is established. Indeed the learned advocates for the appellant have not challenged that part of the finding of the court below.

The learned Subordinate Judge has, in our opinion, been led into error by the supposition that even if the mortgagee proves that the amount of the mortgage money was required for the payment of antecedent debts, it was still incumbent upon him to prove that there was legal necessity for those earlier debts. His whole judgement is affected by this assumption. When dealing with the various items of the mortgage money and the debts for the payment of which they were taken, he has over and over again repeated that the plaintiff has failed to prove necessity for these earlier debts. In this view his chief reliance

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is on the case of *Maharaj Singh* v. *Balwant Singh* (1). He has quoted the following passage from the judgement in that case :—

"It has been repeatedly held in this High Court that where a Hindu son comes into court to assail either a mortgage made by his father or a decree passed against his father, or a sale held or threatened in execution of such a decree, it rests upon him to show that the debt in respect of which the decree was obtained was of such a character that he would not be under a pious obligation to discharge it. . . . . But the appellant in this case is not the assailant, he is defending his title."

From this he has inferred that where the mortgagee is the plaintiff it is not sufficient for him to show that the mortgage money was utilized for the payment of antecedent debts but that he must further show that those debts were required for necessity. We do not think that this is a correct statement of the law as laid down by their Lordships of the Privy Council. In all cases the mortgagee must, in the first instance, establish that his debt was either for legal necessity or for payment of antecedent debts or for the benefit of the family. Once the mortgagee has established that the loan was for payment of antecedent debts it is no longer incumbent upon him to prove that these antecedent debts in themselves were for necessity. In order to get rid of his liability the burden then lies on the son to establish that those antecedent debts were tainted with immorality or illegality. Without proving such immorality or illegality the son cannot succeed, whether he be a plaintiff or defendant to a suit: see *Nanomi Babuasin* v. *Modhun Mohun* (2) and *Brij Narain* v. *Mangal Prasad* (3). We must, therefore, first consider whether the mortgagee has proved that the loan was required for the payment of antecedent debts. If he has succeeded in proving this, we shall then have to see whether the son has discharged the burden of showing

(1) (1905) I.L.R., 28 All., 508.
(2) (1885) I.L.R., 13 Calc., 21.
(3) (1923) I.L.R., 46 All., 95.

that these antecedent debts were tainted with immorality or illegality.

The appellant is a minor son of the age of 8 years who contested the suit under the guardianship of his own mother. Having regard to the circumstances of this case we have no doubt in our mind that it is Bishnath Prasad, the mortgagor himself, who has put up his minor son to defend the claim. We find no good ground for supposing that Bishnath Prasad is not helping the appellant or that so far as the defence of this suit is concerned his interest is in any way adverse to that of the minor. The first significant fact to which the court below has not attached due weight is the absence from the witness-box of Bishnath Prasad himself, who must be in a position to explain what he did with the money which he admittedly borrowed. We realize that it cannot be expected that Bishnath Prasad would expose himself by deposing to his alleged immoral habits, nevertheless when, in our opinion, the defence is a collusive one he might have been put into the witness-box and asked whether he did not spend a large part of the money on his family business.

A still more important circumstance is the suppression of the account books which admittedly exist. We have no doubt in our mind that the defendants' account books have been deliberately withheld in order that no light may be thrown on the needs for which the money was required and on which it was spent.

[The judgement then referred to certain facts and continued :—]

Having regard to all these facts we have no doubt whatsoever in our mind that the defence put forward that these books have been removed by and are in the possession of the plaintiff is deliberately false and has been concocted for the purpose of suppressing material evidence. Even the learned Subordinate Judge, who has

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used unnecessarily strong language against the plaintiff, found it difficult to hold that the plaintiff had in fact removed the books. He has passed over the defendants' assertion lightly and, then assuming that that assertion was untrue, remarked :—

"It was contended that the defendant has failed to produce his books of account and if produced they would have shown the necessity. It is an admitted fact that the necessity of loans is not recorded in *bahi khatas*, and *bahi khatas*, if produced, would have merely shown that such items were credited and such items were debited and would not have proved anything else."

This is a startling statement. The plaintiff's whole case was that the money advanced by him was required for the payment of debts incurred by the defendants for their business and that the money so taken was actually utilized for this purpose. The account books of the two shops would have most undoubtedly shown whether there were any existing previous debts at the time when the loan was taken and whether those debts were discharged with the amount borrowed. If the money taken under the mortgage-deed was received in the shop and spent for the purpose of the shop it would most certainly have disproved the case that this sum was spent on immoral or illegal purposes. Those account books must have contained a separate personal account of Bishnath and that account would most assuredly have shown the amount of money which was spent by Bishnath on his private purposes. The defendants have deliberately withheld these books which would have been almost conclusive evidence of the facts to be inquired into and would have thrown a clear light on the points at issue. When they have withheld such clear evidence every presumption is to be drawn against them.

Before we go into details there is another circumstance which requires mention. The plaintiff's case is that before the execution of the mortgage-deed he wanted

to be satisfied that a large amount of antecedent debts really existed which were required to be paid off. He accordingly asked for a copy of the defendants' accounts to be supplied to him in order that he might see what those debts were. Some *chitthas* in the handwriting of defendants' servants have been produced by the plaintiff which are said to be copies of the accounts supplied to him. The defendants did not admit the genuineness of these *chitthas*.

[The judgement then discussed certain evidence and continued :—]

We must, therefore, hold that these *chitthas* were supplied to the plaintiff about the time when the mortgage-deed was executed. Both these *chitthas* contain amounts previously due to creditors, with their names, and in the absence of the account books they are, in our opinion, good evidence to show that antecedent debts did exist. The learned Subordinate Judge has not appreciated their importance and has not attached to them the weight which they deserved.

With these preliminary remarks we now proceed to examine the various items of the mortgage consideration.

[The judgement here discussed the evidence, and continued :—]

The result of our findings is that the entire sum of Rs. 38,000 was advanced and was actually utilized towards the discharge of previous debts of the mortgagor. Under the circumstances it was wholly unnecessary for the plaintiff to go further and show that these previous debts were for actual necessity. After the proof of these debts the burden lay upon the son to show that these previous debts were tainted with immorality.

The learned Subordinate Judge when dealing with most of these items has held that no necessity for these previous debts has been established. He has arrived at this conclusion by ridiculing the plaintiff's oral

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evidence that almost all these debts were required for the purpose of the family business or the *gola*. He has criticized the plaintiff when he stated that he made inquiries from the previous creditors when he met them in the bazar and was told that the money had been required for the purposes of the *gola* and for payment to the customers of the defendant's business. . . We are wholly unable to follow the criticism of the learned Subordinate Judge, which we suppose can be explained only on the assumption that in his opinion the necessity for the antecedent debts has also to be definitely established. We have already held that this view was utterly erroneous.

In our opinion, therefore, unless the son can establish to our satisfaction that those previous debts or any one of them were tainted with illegality or immorality his defence must fail.

The defendant has no doubt produced a number of respectable witnesses whose evidence clearly goes to show that Bishnath Prasad, soon after attaining majority, entered upon a reckless and extravagant career not unattended by immoral pursuits. The learned Subordinate Judge has clearly found this point in favour of the defendant and we have no hesitation in accepting that finding. It may, therefore, be taken that there is proof of the general immoral character of Bishnath Prasad about the time when this mortgage-deed was executed or even about the time when these previous antecedent debts were incurred. The learned Subordinate Judge has quoted extensively from the judgement of this High Court in *Maharaj Singh* v. *Balwant Singh* (1) and has tried to draw an analogy from the similarity of certain circumstances. His inference is that these debts must have been contracted for immoral purposes. The learned Subordinate Judge's view seems to be that it is not necessary for the son to connect the immorality with the debt but

(1) (1905) I.L.R., 28 All., 508.

that proof of the general immoral habits of the defendant Bishnath Prasad at the time the debts were advanced would be sufficient to justify the court in presuming that the debts were so tainted.

We think that we should once and for all refute this contention. In the case of *Sri Narain* v. *Lala Raghubans Rai* (1) the Subordinate Judge had presumed the taint of immorality from the general evidence produced. The High Court of Allahabad held that no inference could be drawn that the debts were connected with the immoral pursuits of the mortgagor unless there was definite evidence to prove the connexion. Their Lordships of the Privy Council entirely agreed with the High Court that the general charge of immorality was wholly insufficient and that the connexion between the immorality and the debt must be proved. This view has been followed in numerous cases. We may only mention *Babu Singh* v. *Bihari Lal* (2), *Narendra Bahadur Singh* v. *Abdul Haq* (3) and *Dhullipallia* v. *Kuppa Venkatkrishnayya* (4).

If this were not the correct law, the position of mortgagees would become wholly insecure and intolerable. Even the payment of antecedent debts would be nullified by proof that the father was an immoral person. Oral evidence showing the private character of the father, which might not have been in any way connected with the antecedent debts, could be easily procured. It, therefore, seems to be a wholesome principle to insist on the son connecting the debt with the immorality before he can vitiate the debt.

Direct evidence to connect the immorality of Bishnath with the debts is lacking or is at any rate unsatisfactory. Similarly, direct evidence to bring home to

(1) (1912) 17 C.W.N., 124.
(2) (1908) I.L.R., 30 All., 156.
(3) (1915) 30 Indian Cases, 216.
(4) (1918) 36 M.L.J., 296; 58 Indian Cases, 797.

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Tulshi Ram the knowledge that the antecedent debts had been incurred for family purposes is also not forthcoming.

The learned Subordinate Judge, however, has relied on certain circumstantial evidence to justify the inference that the previous debts must have been connected with immorality. His view may be summarized as follows :— Bishnath had no ancestral debts to discharge. The entire indebtedness of Bishnath came into existence within three years before the mortgage-deed. He had sufficient income from his zamindari property to maintain himself decently. His commission agency business was not of a kind in which there could possibly be any loss. Bishnath was undoubtedly leading an extravagant and licentious life and squandering money. Tulshi Ram was managing the defendant's estate till Sambat 1975 and must, therefore, have been fully aware of the immoral life of the defendant. From these circumstances he has thought that "the only inference which anyone can derive from the above evidence is that the loan must have been contracted for immoral purposes and the mortgage was executed to pay such debts." As regards the inquiry on behalf of the plaintiff his conclusion was that a mere inquiry from the prior creditors, and their general statement that the money had been advanced for the purposes of the *gola* business, were inadequate.

The defendant's case is that there were no ancestral debts to be discharged when Bishnath attained majority. On the other hand, Tulshi Ram stated that after the death of Sheo Shankar Ram when he checked the papers he found that about Rs. 28,000 or Rs. 29,000 were due by Sheo Shankar Ram, and he accordingly told his widow about it. He also advised her that if she had the money she should pay up the debts, but she replied that she had no cash. Tulshi Ram also stated that the shop at Calcutta, which had suffered a loss of Rs. 12,000, was

subsequently closed down. The defendant's version is supported only by oral evidence. We think that in a matter of this kind it is unsafe to rely on the oral testimony of either side. The only conclusive way of finding out whether there was any large indebtedness at the death of Sheo Shankar Ram would have been an examination of the defendant's account books, which, as we have held above, have been deliberately withheld by the latter. The mere fact that balances were struck and accounts on either side balanced year after year is by no means conclusive to show that there were no previous deficits carried over. Nor can the mere fact that the accounts with some of the plaintiff's witnesses were opened within three years of the mortgage-deed necessarily negative the existence of any indebtedness to anybody else. We are accordingly unable to draw the inference which the learned Subordinate Judge has, in spite of the absence of the account books, drawn.

[The judgement proceeded to discuss the reasons for disagreeing with the findings of the court below as to antecedent debts and immorality, and concluded :—]

Tulshi Ram, in our opinion, was justified in advancing money for the discharge of such debts. We have remarked that it is fully established that the whole consideration of Rs. 38,000 was in fact paid by Tulshi Ram. We find it difficult to believe that the latter would have advanced such a large sum of money out of his own pocket if he had known with certainty that the previous debts which were going to be discharged were all directly tainted with immorality and were such as could not have been recovered by the creditors. It would have meant taking a risk which would not be undertaken by a man of ordinary intelligence and prudence. We, therefore, feel it impossible to uphold the decree of the court below.

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We accordingly allow this appeal and setting aside the decree of the court below decree the plaintiff's suit with costs in both courts.

Appeal allowed.

Before Sir Grimwood Mears, Knight, Chief Justice and Mr. Justice Dalal.

1927 *March*, 15.

JAGAT SINGH AND OTHERS (PLAINTIFFS) *v.* JAI NARAIN AND OTHERS (DEFENDANTS).*

Civil Procedure Code, order XXXIV, rule 14—Mortgage—Same property subject to a usufructuary mortgage and a later simple mortgage to same mortgagee—Effect of sale under a decree on the later mortgage.

Two villages were mortgaged usufructuarily on the 20th of April, 1877, for Rs. 22,000, and half of a third village was hypothecated as collateral security. Four days later, the mortgagee leased the first two villages to the mortgagor, and the mortgagor hypothecated all three villages to the mortgagee as security for the lease-money. The lease-money was not paid and in consequence the lessee was ejected. The mortgagee then, having taken possession, brought a suit on the deed of the 24th of April, 1877, (the second, and simple, mortgage) for the sale of the three villages, subject to his earlier mortgage of the 20th of April, and, having obtained a decree, brought the property to sale and purchased it himself.

Held, on suit by the heirs of the mortgagor to redeem the earlier (usufructuary) mortgage, that what was really sold and purchased by the defendants, mortgagees, decree-holders was the plaintiffs' equity of redemption, and, therefore, the suit could not be maintained. *Khairajmal* v. *Daim* (1), *Lal Bahadur Singh* v. *Abharan Singh* (2), *Sardar Singh* v. *Ratan Lal* (3), *Mata Din Kasodhan* v. *Kazim Husain* (4), and *Parmanand* v. *Daulat Ram* (5), referred to.

THE facts of this case are fully stated in the judgement of the Court.

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* First Appeal No. 161 of 1924, from a decree of Gauri Prasad, Subordinate Judge of Pilibhit, dated the 3rd of January, 1924.

(1) (1904) L.R., 32 I.A., 23; I.L.R, 32 Calc., 296. (2) (1915) I.L.R., 37 All., 165.

(3) (1914) I.L.R., 36 All., 516. (4) (1891) I.L.R., 13 All., 432.

(5) (1902) I.L.R., 24 All., 549.

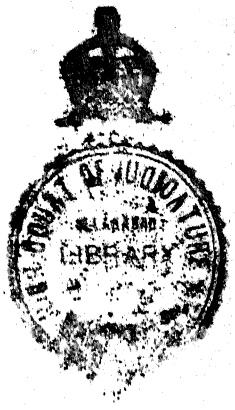
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JAGAT SINGH v. JAI NARAIN.

Sir *Tej Bahadur Sapru* and Mr. *P. N. Sapru*, for the appellants.

Dr. *Surendra Nath Sen*, Pandit *Uma Shankar Bajpai* and Munshi *Binod Bihari Lal*, for the respondents.

MEARS, C. J., and DALAL, J. :—This is an appeal by the plaintiffs from the dismissal of their suit for redemption of a mortgage. They are the sons and grandsons of Bahadur Singh and Tundi Singh who executed the mortgage in suit on the 20th of April, 1877, in favour of Damodar Das for a sum of Rs. 22,000. Under the mortgage two villages, Ramnagar Jagatpur and Pasgawan, were mortgaged with possession, and half share in village Deothan was hypothecated by way of security for payment of the mortgage money at the time of redemption, should the value of the two villages mortgaged with possession prove insufficient to pay the debt. The rate of interest, and the collection charges were fixed by agreement between the parties. The result of the transfer was that Damodar Das took possession as mortgagee of the two villages, and obtained a lien by way of a simple mortgage over the third village. Four days later, on the 24th of April, 1877, the mortgagee leased the two villages Ramnagar Jagatpur and Pasgawan to the mortgagors, and on the same day the mortgagors hypothecated the two villages and half share in village Deothan as security for payment of the lease-money agreed to be paid. A charge was created, in clause (6), in the following words :—



" In security of the lease-money we hypothecate the 20-biswa share in each of the villages Ramnagar Jagatpur and Pasgawan named above, and the 10-biswa share in mauza Deothan, in addition to the charge of the mortgage money due under the mortgage-deed, dated the 20th of April, 1877."

As usually happens in these cases, the mortgagors behaved as if nothing had happened, went on pocketing the profits of the villages and paid nothing to the mortgagee lessor. The result was that under clause (2) of

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the lease Bahadur Singh and Tundi Singh were ejected from the two villages on the 15th of May, 1879. After taking possession of the two villages, Damodar Das instituted a suit to enforce the simple mortgage of the 24th of April, 1877, against the three villages on the 10th of June, 1880, for recovery of the amount of arrears of lease-money. The prayer in that suit was that a money decree may be passed, and in case of default of payment the property subsequently hypothecated, that is, the three villages, may, subject to the prior hypothecation lien created under the mortgage-deed of the 20th of April, 1877, be sold by auction. The claim was admitted, and Damodar Das obtained a judgement and decree in terms of his prayer in the plaint. The property was put up to auction and purchased by Damodar Das himself in satisfaction of the decree. The terms of the sale certificate are :—

"The entire 20 biswas in the village Ramnagar Jagatpur and the entire 20 biswas in the village Pasgawan as well as 10 biswas in the village Deothan were purchased by Damodar Das for Rs. 10,400 with proclamation that Rs. 22,000, the prior mortgage money, was due to the decree-holder in this suit and that a suit was brought by Carew and Company to the effect that the judgement-debtors had sold the jungle . . . in village Deothan . . . and that a claim was brought by Musammat Rupni, daughter of Jagat Singh, a minor, to the effect that the property advertised for sale was ancestral, and the judgement-debtors had spent the money for unlawful purposes, and that Rs. 1,000 were in arrears in village Deothan."

This is a clear narration of the disabilities alleged to attach to the property and what would or might affect the property in the hands of the auction-purchaser.

In the lower court the argument was that the property did not pass to Damodar Das because the sons of the mortgagors were not parties to the decree. It is obvious that to render a sale ineffectual on that ground it was necessary for the plaintiffs to prove that the debts

were contracted for immoral purposes. They admittedly failed to lead evidence in the matter.

In this Court, however, all other grounds of appeal were abandoned and the plaintiffs appellants' learned counsel, Dr. *Sapru*, confined himself to only one argument—that the sale certificate did not transfer the equity of redemption to Damodar Das because the usufructuary mortgage was saved and, therefore, the plaintiffs still had an existing right for the redemption of the usufructuary mortgage in suit. The one question, therefore, presented to us for decision is whether by the sale of the 22nd of November, 1881, duly confirmed by the court executing the decree, the mortgagors' right in the equity of redemption was extinguished or not. The learned counsel's argument was that the equity of redemption was preserved to the mortgagors. If so, the conclusion must be that nothing was sold. If the purchaser had been some person other than Damodar Das, he would have paid Rs. 10,400 without obtaining any rights in the property, because, on the one hand, he was liable to redemption, according to the learned counsel, by the mortgagors, and, on the other, a usufructuary mortgagee was in physical possession of the property. It will be helpful to consider for a moment the situation as it existed on the 15th of May, 1879, when Bahadur Singh and Tundi Singh were ejected from possession of the property. The rights of Damodar Das on that day were a charge on two villages under the usufructuary mortgage, dated the 20th of April, 1877, and a subsequent charge on them under the simple mortgage of the 24th of April, 1877. On village Deothan he had two liens, one under the usufructuary mortgage of the 20th of April, 1877, and the other under the simple mortgage of the 24th of April, 1877. Thus, after preserving his rights under the mortgage of the 20th of April, he was entitled to bring to sale the equity of redemption

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in all the three villages under the simple mortgage of the 24th of April. It is well recognized now that the equity of redemption is as much property under the Transfer of Property Act as actual physical immovable property. There can be no doubt that what Damodar Das did was to sue in 1880 for the sale of this equity of redemption, and, when a decree was passed, what was put up to auction was this equity of redemption. It was the equity of redemption owned by Bahadur Singh and Tundi which was sold at auction, and after the sale it no longer remained their property.

It was argued that the sale was void by reason of the principles enacted, subsequent to the sale, in section 99 of the Transfer of Property Act (No. IV of 1882), which ran as follows :—

"When a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under section 67."

What happened in the present case, however, was that the property (equity of redemption) was brought to sale by instituting a suit similar to one under section 67 of the Transfer of Property Act and not otherwise.

Secondly, the terms of this section are much wider than the equitable principle applying to such a case, and, therefore, the prohibition of the enactment cannot be applied in the very terms of the section to a sale which took place prior to 1882. The equitable principle is now laid down in the present Code of Civil Procedure, order XXXIV, rule 14, which repealed the provisions of section 99. The rule lays down :—

"Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage."

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This is the equitable principle laid down by their Lordships of the Privy Council in *Khairajmal* v. *Daim* (1). Possibly the attention of their Lordships was then not called to the wider terms of section 99 of the Transfer of Property Act. What they said was :—

"But the Judge has made a decree for redemption of the whole estate, on the ground that the mortgagees could not acquire the equity of redemption directly or indirectly by purchase at a court sale except by a suit brought on the mortgage, on account taken and time specially allowed for redemption. Their Lordships throw no doubt on the principle, which has been acted on in many cases in India, that a mortgagee cannot, by *obtaining a money decree for the mortgage debt* and taking the equity of redemption in execution, relieve himself of his obligations as mortgagee, or deprive the mortgagor of his right to redeem on accounts taken, and with the other safeguards usual in a suit on the mortgage."

We are of opinion that in 1881, when the sale took place, the principle of equity enunciated by their Lordships was applicable and not a prohibition as laid down in section 99 of the Transfer of Property Act. In addition to this, we have already given reasons for holding that even if the principle of the provisions of section 99 of the Transfer of Property Act applied in terms to the sale of 1881, the equity of redemption in the auctioned property would not be saved to the mortgagors after the sale was confirmed.

We have avoided, in discussing the learned counsel Dr. *Sapru's* arguments, a reference to a Full Bench ruling of this Court, *Lal Bahadur Singh* v. *Abharan Singh* (2), which would be a complete answer to his arguments. That ruling is in sharp conflict with an earlier ruling of a Divisional Bench of this Court, *Sardar Singh* v. *Ratan Lal* (3). It was not necessary for us to inquire whether the sale of 1881 was void or only voidable, because the sale was not held in execution of a money

(1) (1904) L.R., 32 I.A., 23; I.L.R., 32 Calc., 296. (2) (1915) I.L.R., 37 All., 165.
(3) (1914) I.L.R., 36 All., 516.

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decree, nor in execution of a decree arising out of the mortgage which is the subject of the present suit. That decree itself was a decree for sale on foot of a mortgage and obtained, as observed by their Lordships in *Khairaj-mal* v. *Daim* (1), " on accounts taken, and with the other safeguards usual in a suit on the mortgage." It was a suit for sale of the equity of redemption by a subsequent mortgagee, a suit well recognized in these provinces except during the period during which the rule laid down in the case of *Mata Din Kasodhan* v. *Kazim Husain* (2), prevailed in this Court. The facts of the present case are, in our opinion, similar to those of *Parmanand* v. *Daulat Ram* (3), with this difference that sale of an equity of redemption is now held to have been contemplated by the Transfer of Property Act. The learned Chief Justice, Sir JOHN STANLEY, and Mr. Justice BANERJI held in that case that the sale (like the one of 1881 in this case), having been the outcome of a suit under section 67 of the Transfer of Property Act (No. IV of 1882), did not offend against section 99 of the Act.

The appeal fails and is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Boys and Mr. Justice Kendall.

1927
March, 29.

NAND KISHORE (DEFENDANT) *v.* RAM SARUP (PLAINTIFF).*

Act No. IV of 1882 (*Transfer of Property Act*), *section* 36—*Purchase at auction of zamindari property—Possession delayed—Collection of rents by judgement-debtor—Method of apportioning collections between judgement-debtor and auction-purchaser.*

Plaintiff, on the 20th of February, 1919, became the purchaser at an auction-sale held in execution of a decree of some

* Second Appeal No. 1294 of 1924, from a decree of Ganga Nath, Additional Subordinate Judge of Moradabad, dated the 16th of May, 1924, modifying a decree of Banwari Lal, City Munsif of Moradabad, dated the 11th of January, 1923.

(1) (1904) L.R., 32, I.A., 23; I.L. R., 32 Calc., 296.

(2) (1891) I.L.R., 13 All., 432.

(3) (1902) I.L.R., 24 All., 549.

zamindari property. He did not, however, get possession until some time in June, 1919, and meanwhile the judgement-debtor had made certain collections on account of the *rabi* of 1919.

Held, on suit by the auction-purchaser to recover from the judgement-debtor his proportionate share of the moneys collected, that the rights and liabilities between the plaintiff and the defendant should have been determined on the basis of the total *rabi* rent and the number of days in the *rabi* season, the defendant being given credit for a proportion of the *rabi* rent based on the number of days which fall within the period of his lawful possession, and the plaintiff being credited with a share of the *rabi* rent based on the number of days between the date of his purchase and the date on which the *rabi* rent fell due.

THE facts of this case sufficiently appear from the judgement of the Court.

Munshi *Narain Prasad Ashthana*, for the appellant.

Babu *Piari Lal Banerji*, for the respondent.

BOYS and KENDALL, JJ. :—There was a decree against the defendant, who is appellant here, as a result of which the property was put up for sale, and on the 20th of February, 1919, the plaintiff purchased it. He did not get possession till some time in June, 1919. The defendant made certain collections on account of the *rabi* of 1919. The plaintiff, therefore, was entitled to be recouped something by the defendant, and the only difficulty that has arisen in this case has been on what basis he was entitled to recover.

The plaintiff having purchased the property on the 20th of February, 1919, and the *rabi* rent falling due on the 1st of May, 1919, by section 36 of the Transfer of Property Act " all rent upon the transfer of the interest of the person entitled to receive such rent shall be deemed, as between the transferor and transferee, to accrue due from day to day and to be apportionable accordingly, but to be payable on the days appointed for the payment

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thereof." The *kharif* and *rabi* payments were due in a proportion of 10 annas in the rupee on the 1st of December and 6 annas for the *rabi* on the 1st of May in each year. The amount, then, the plaintiff would be entitled to receive would vary according as the divisible unit be taken to be the whole rent for the whole year or the *rabi* portion of the rent for the *rabi* season of the year. The case first came before a Single Judge of this Court, who, the point being arguable and without authority upon it, referred it to a Division Bench, as it was a case which must arise again frequently in the future and govern important interests. The question has been argued afresh before us, and we are still without the assistance of any authority upon the point. We have, therefore, merely to determine which, in view of section 36 and the general circumstances of such a case, is the most appropriate method of dividing the rights and liabilities.

It is at the outset clear that there is a sharp and easily determined demarcation between the proportions of rent paid for the various seasons, at any rate in the present case. About this there can be no dispute. The rent was divisible into 10 annas and 6 annas, and no tenant could claim that his payment of the 10 annas should be postponed until such period as the whole 16 annas might be due.

Similarly, the division of the year into the *kharif* and *rabi* seasons is sharply demarcated by the fixed dates on which payments for these respective seasons are to be made. There is, therefore, no difficulty whatever in determining the rights and liabilities on the basis of the *rabi* season and the *rabi* rent.

If, on the 30th of November or the 1st of December, a tenant had paid up his full 10 annas for the *kharif*, what could be the rent which was gradually accumulating against him from day to day? It can surely only be the

daily proportion of the *rabi* rent. This is exactly the term which is used in section 36 of the Transfer of Property Act, which lays down as the basis the rent daily accruing.

That this is the correct view finds support if the question is regarded from another aspect which we may illustrate by an example. If the rent accruing from day to day is to be held to be the daily proportion of the total annual rent, and the total annual rent is Rs. 160, the rent accruing from day to day is Rs. 160/365. The *kharif* season (May to November) is 214 days, and on the annual basis the rent accrued during the *kharif* period would be Rs. 160/365 × 214, approximately Rs. 94, but the tenant has a defined liability to pay 10 annas of the total, i.e., Rs. 100. Similarly, on an annual basis the *rabi* liability would be approximately Rs. 66, while on his contract the *rabi* liability would be Rs. 60.

We are of opinion, therefore, that the rights and liabilities between the plaintiff and the defendant, the transferee and the transferor, should have been determined on the basis of the total *rabi* rent and the number of days in the *rabi* season, the defendant being given credit for a proportion of the *rabi* rent based on the number of days which fall within the period of his lawful possession, and the plaintiff being credited with a share of the *rabi* rent based on the number of days between the date of his purchase and the date on which the *rabi* rent fell due. In order to avoid a remand or remitting an issue in the case, we have discussed with counsel for the appellant and for the respondent the figures, and it is agreed that, on the basis already determined by this judgement, the defendant must be held entitled to Rs. 228 of the *rabi* rent Rs. 404. The amount of the collections which the defendant had made on account of *rabi* prior to the date when the *rabi* rent really became payable is Rs. 371. The plaintiff is, therefore, entitled to

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have from the defendant a sum of Rs. 143, plus interest from the date of his purchase to the date of realization from the defendant. Allowing the appeal and setting aside the decrees of the lower courts, we decree accordingly. The appellant will have his costs as already decreed in the trial court and the lower appellate court, and the defendant appellant here will have his costs of the appeal.

Appeal allowed.

Before Mr. Justice Sulaiman and Mr. Justice Banerji.

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April, 25.

MUNNI LAL (DEFENDANT) *v.* PHULA (PLAINTIFF) AND UDIT RAM AND ANOTHER (DEFENDANTS).*

Hindu law—Joint Hindu family—Partition between sons—Effect of pendency of partition proceedings on mortgage given by sons—Nature of mother's estate in property given to her on partition.

Pending proceedings for the partition of joint family property between the sons, the father being dead, the sons mortgaged a portion thereof. On the completion of the partition the portion mortgaged fell to the share of the mother.

Held, that the doctrine of *lis pendens* applied and the mortgage was not binding on the property in the hands of the mother.

Held also, that a mother at the time of partition has no share as a co-parcener. She is only entitled to maintenance, and if a share is given to her on partition, it is given to her by way of provision for her maintenance, and when the necessity for maintenance ceases, the property will revert to the estate from which it was taken. *Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh* (1), referred to.

THE facts of the case fully appear from the judgement of the Court.

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* First Appeal No. 284 of 1924, from a decree of Mirza Nadir Husain, Second Additional Subordinate Judge of Aligarh, dated the 25th of February, 1924.

(1) (1912) I.L.R., 34 All., 234.

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MUNNI LAL v. PHULA.

Pandit *Shiam Krishna Dar*, for the appellant.

Munshi *Panna Lal*, for the respondents.

SULAIMAN and BANERJI, JJ. :—This is a defendant's appeal arising out of a suit for recovery of possession of property by avoidance of a mortgage-deed executed by the plaintiff's sons, and a decree passed thereon and the consequent purchase, followed by mutation of names in favour of the mortgagee. The plaintiff's case, as set forth in the plaint, was that the original owner of this property was Paras Ram, who under an oral will had bequeathed a one-third share in the estate to his wife, Musammat Phula; that her name has remained entered as heir; that subsequently there was a private partition between the sons in 1905 under which she got her property separated; that this has been followed by partition proceedings in the revenue court under which a separate *mahal* was constituted; that in spite of all these facts the defendant No. 1 took a mortgage from her sons Udai Ram and Ram Chander of the plaintiff's share, which was in no way binding on her. The contesting defendant denied that there was any bequest in favour of the widow or that she got any property on partition. He pleaded that her name was entered in the revenue papers for the sake of her consolation and she had no proprietary interest. The learned Subordinate Judge has come to the conclusion that the will set up by the plaintiff was proved and she entered into possession under the directions of her deceased husband. He has further held that there was a private partition between the said sons at which she got a definite share, and lastly he has held that the revenue court proceedings were a bar to the defence. He has decreed the plaintiff's claim for proprietary possession of the property.

We are not satisfied that the finding of the learned Subordinate Judge as regards the oral will should be accepted.

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[The judgement then discussed the evidence on the point and concluded as follows :—]

On the other hand, the finding of the learned Subordinate Judge that there was a partition among the sons and that the widow got a share of her own, must be accepted. This finding is not based on the oral testimony of two witnesses, Dip Chand and Bhup Singh, but is supported by plenty of documentary evidence. The name of the lady has continued in the revenue papers for a long time and her assertion of a separate proprietary interest in the property over which her name is recorded has been accepted twice by the revenue court. In 1907, when an application for partition by another person was made, she also applied that her share should be separated. Udai Ram, one of the sons, objected on the ground that she had no proprietary interest in the property at all. The revenue court by an order overruled this objection and decided that she had a proprietary interest. This partition, however, did not come off, as, for some reason or other, the application for partition was either not pressed or was struck off. Subsequently in 1909 an application for partition was made by Musammat Phula herself, which also was objected to by Udai Ram. In spite of the objection the partition court directed that the partition should be completed and five separate *mahals* have been constituted. It was during the pendency of these partition proceedings that the main contesting defendant obtained the mortgage in dispute. We are, therefore, of opinion that it is not possible for the contesting defendant to contend that the plaintiff does not possess any proprietary interest at all. The order of the revenue court operates as a decree of a civil court and is binding on a transferee *pendente lite*.

It is conceded by the learned vakil for the appellants that if the widow got the property on partition she would have a Hindu widow's estate which would go to the line

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of her husband on her death. This view is confirmed by a judgement of their Lordships of the Privy Council in *Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh* (1). On the finding that the widow got the property on private partition, the appeal must stand dismissed.

We may, however, mention that the argument of the learned vakil for the appellants, that in case she had obtained this property in lieu of maintenance there would be a limited estate with a vested remainder, cannot be accepted. As observed by their Lordships of the Privy Council in the case referred to above, a mother at the time of the partition has no share as a co-parcener. She is only entitled to maintenance and if a share is given to her on partition, it is given to her by way of provision for her maintenance, and when the necessity for maintenance ceases, the property will revert to the estate from which it was taken. It seems to us that the principle underlying the two cases is the same, and it is impossible to hold that the widow has got a limited estate with a remainder in the sons. The appeal is accordingly dismissed with costs.

Appeal dismissed.

Before Mr. Justice Sulaiman and Mr. Justice Banerji.

GIRDHARI LAL (PLAINTIFF) *v.* GOBIND RAI (DEFENDANT).*

1927
April, 26.

Act (Local) No. II of 1901 *(Agra Tenancy Act), sections* 164 *and* 201(3)—*Suit for profits—Presumption—"Shall presume."*

If the conditions laid down in section 201(3) of the Agra Tenancy Act, 1901, are fulfilled, the presumption raised is irrebuttable and conclusive, and the court is not entitled to go

* Second Appeal No. 479 of 1925, from a decree of H. Beatty, Additional Judge of Saharanpur, dated the 9th of December, 1921, confirming a decree of Rahman Bakhsh Qadri, Assistant Collector, first class, of Saharanpur, dated the 2nd of July, 1923.

(1) (1912) I.L.R., 34 All., 234.

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into any such question as whether the plaintiff and defendant are members of the same joint family of which the defendant is the *karta*. *Durga Prasad* v. *Hazari Singh* (1), and *Sheo Narain* v. *Bela Rai* (2), followed.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Dr. *M. L. Agarwala*, for the appellant.

Pandit *Narmadeshwar Prasad Upadhiya*, for the respondent.

SULAIMAN and BANERJI, JJ. :—This is a plaintiff's appeal arising out of a suit for profits under section 164 of the old Agra Tenancy Act against a *lambardar*. The plaintiff's name is recorded as proprietor of a specific area of land with a specific share of the profits. The defendant is admittedly a *lambardar* of the village. The parties are brothers. The courts below have dismissed the suit on a finding that the family is joint, and that a member of a joint Hindu family has no right to claim profits from the *karta* of the family.

In our opinion, it was not open to the courts below to go into the question of the jointness or the separation of the parties. The plaintiff repudiated the suggestion that he was a member of a joint Hindu family. His name was recorded as a proprietor in the revenue papers for the years for which the profits were claimed. Under section 201, clause (3), if the plaintiff is recorded as having the proprietary right entitling him to institute a suit under the provisions of Chapter XI, the court shall presume that he has this right. The defendant's plea that the plaintiff has no such right because the family was joint, should not have been allowed to prevail.

It was held by a Full Bench of this Court in the case of *Durga Prasad* v. *Hazari Singh* (1), that the words "shall presume" in the section mean irrebuttable and

(1) (1911) I.L.R., 33 All., 799. (2) (1922) I.L.R., 44 All., 616.

conclusive presumption. The learned vakil for the respondent relies on an unreported case decided by SUNDER LAL, J., namely, *Dharam Singh* v. *Ratti* (1). That case no doubt helps him. We are of opinion that the learned Judge's view that the presumption merely meant that the recorded co-sharer had a proprietary right and did not mean that he had a right to institute a suit for profits, was not correct. Reading clause (1) with clause (3), it is obvious that the presumption relates to the existence of the proprietary right entitling the recorded co-sharer to institute a suit for profits under Chapter XI of the Act. The view of the Single Judge is contrary to that subsequently expressed by a Bench of this Court in the case of *Sheo Narain* v. *Bela Rai* (2), where it was held that the presumption was nonetheless applicable because the parties to the suit may be members of a joint Hindu family. As remarked above, we think that the question of jointness should not at all have been gone into.

We may note that the learned District Judge has relied on the fact that an entry in the *wajib-ul-arz* for a previous period indicates that the defendant collects rent as the manager of a joint Hindu family. This *wajib-ul-arz* not being for the years in suit, cannot override the entry in the *khewat*. It is also possible that a family may be joint in the year for which the *wajib-ul-arz* has been prepared and may become separate afterwards. Under these circumstances the presumption under section 201, as interpreted above, stands.

We accordingly allow this appeal and setting aside the decree of the courts below remand the case under order XLI, rule 23, to the court of first instance through the lower appellate court for the determination of the correct amount of profits due to the plaintiff.

Appeal allowed and cause remanded.

(1) (1917) S.A., No. 443 of 1913, decided on the 1st of March, 1917.
(2) (1922) I.L.R., 44 All., 616.

April, 26. 1927

Before Mr. Justice Iqbal Ahmad and Mr. Justice Kendall.

NIZAM-UD-DIN (PLAINTIFF) *v.* AHMAD BHAI AND Co., (DEFENDANTS)*

Civil Procedure Code, section 11—Res judicata—*Mutual and common account—Suit by one party on the account followed by a decree—Second and similar suit by the other party not maintainable.*

A and *N* were in the habit of purchasing goods of a similar nature from each other, and of these transactions one mutual account was kept. On this account *A* sued *N* and obtained an *ex parte* decree. *N* tried to get this decree set aside, but failed. He then sued *A* on the same account for the same year, but beginning and ending about a month earlier.

Held, that the suit would not lie, being barred by the principle of *res judicata*. *Hook* v. *Administrator-General of Bengal* (1), referred to.

THE facts of this case sufficiently appear from the judgement of the Court.

Pandit *Gopi Nath Kunzru*, for the appellant.

Pandit *Shiam Krishna Dar*, for the respondent.

IQBAL AHMAD and KENDALL, JJ. :—This appeal arises from a suit in which the parties are found to have carried on a mutual and common account; each of them purchased boots and shoes from the other. The defendant respondent brought a suit against the present plaintiff appellant in the Small Causes Court, Agra, in 1923, which was based on the mutual account from the 6th of July, 1921, to the 7th of November, 1921, and he obtained a decree *ex parte* against the present plaintiff. The plaintiff attempted to have the *ex parte* decree set aside, but without success. He has now brought the present suit. In the plaint, which is dated the 10th of April, 1924, he claims a sum of Rs. 867 on the basis of an account due from the defendant from the 9th of June,

* Second Appeal No. 483 of 1925 from a decree of A. G. F. Pullan, District Judge of Agra, dated the 18th of November, 1924, confirming a decree of Alakh Murari, Munsif of Agra, dated the 7th of July, 1921.

(1) (1921) I.L.R., 48 Calc., 499.

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1921, to the 3rd of October, 1921. Both the courts below dismissed the plaintiff's suit on the ground of *res judicata* but they have also expressed the opinion that the plaintiff's account in the present suit is not a genuine account.

It has been urged in this Court on behalf of the appellant that each of the parties had a separate account and that the transactions were independent and that each could form a basis of a separate litigation; that is to say, the present plaintiff could sue the defendant for goods sold by the plaintiff to the defendant, while the present defendant could sue the plaintiff independently for goods sold by the defendant to the plaintiff. It has, however, been found as a fact by the courts below that the account is a common and mutual account and this has been admitted by the present plaintiff in the trial court. The lower appellate court has referred to the words of Sir BARNES PEACOCK quoted in the judgement of their Lordships of the Privy Council in the case of *Hook* v. *Administrator-General of Bengal* (1), and this decision clearly covers the present case. There is no force in the present appeal and it is dismissed with costs.

Appeal dismissed.

Before Justice Sir Cecil Walsh and Mr. Justice Ashworth.

PARTAB NARAIN (DEFENDANT) *v.* THE JUTE MILLS (PLAINTIFF).*

1927
April, 26.

Principal and agent—Forged bill presented by agent—Liability of principal.

Plaintiff and defendant had dealings together and the defendant was in the habit of paying to the plaintiff's servants. One of the plaintiff's servants presented a bill, on which the defendant paid. The bill was afterwards found to be a forgery.

* Second Appeal No. 549 of 1925, from a decree of H. E. Holme, District Judge of Cawnpore, dated the 16th of December, 1924, reversing a decree of Sarup Narain, Second Subordinate Judge of Cawnpore, dated the 17th of May, 1924.

(1) (1921) I.L.R., 48 Calc., 499.

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PARTAB NARAIN v. THE JUTE MILLS.

Held, that the plaintiff was liable to make good the amount paid by the defendant. *Barwick v. English Joint Stock Bank* (1), followed.

Dr. *Kailas Nath Katju*, for the appellant.

Pandit *Gopi Nath Kunzru*, for the respondent.

WALSH, J. :—This appeal must succeed. On the findings of the court below the case is unarguable. The plaintiff and defendant had dealings together and the defendant was in the habit of paying to the plaintiff's servants. The plaintiff's servant Ram Nath presented a forged bill on which the defendant paid. The learned Judge in the court below has found that if it had been a genuine bill, the payment would have been a good payment. A man who does a thing through an agent does it himself in the eyes of the law and, therefore, the presentation of the forged bill was just as much the act of the principal as a genuine bill. As was said in the leading case of *Barwick* v. *English Joint Stock Bank* (1) :

" It is true that the principal has not authorized the particular act but he has put the agent in his place to do that class of acts and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in."

ASHWORTH, J. :—I agree with the view of my learned brother on the law, but would point out that the evidence did not establish that this particular servant Ram Nath had ever been entrusted with the duty of presenting bills to the defendant firm but merely that other servants in the employ of the plaintiff, of no superior degree to this Ram Nath, were entrusted on various occasions with the duty of presenting bills. On this evidence I hold that the lower appellate court had some evidence to support a finding of fact that the presentation of the bill by Ram Nath, even though not within the scope of his actual authority, was within the scope of his apparent authority.

(1) (1867) L.R., 2 Exch., 259(266).

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BY THE COURT.—The order of the Court is that the appeal be allowed and the plaintiff's suit be dismissed with costs throughout.

Appeal allowed.

Before Mr. Justice Sulaiman and Mr. Justice Boys.

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April, 26.

GHARIB RAI AND ANOTHER (PLAINTIFFS) *v.* MUKH LAL RAI AND OTHERS (DEFENDANTS).*

Act No. XVI of 1908 (*Indian Registration Act*), *section* 17(b) *—Registration—Compromise—Recital of agreement between the parties to a mutation case coupled with a request that the property in suit might be partitioned in a particular way.*

Held, following the principles laid down in *Satrohan Lal* v. *Nageshwar Prasad* (1), *Bakhtawar* v. *Sundar Lal* (2) and *Mahomed Musa* v. *Aghore Kumar Ganguly* (3), that a document filed in a mutation case which merely set forth that the parties had settled the matters in dispute between them and that they desired that the property in suit should be partitioned in such and such a manner was not a document the registration of which was necessary.

THE facts of this case sufficiently appear from the judgement of BOYS, J.

Dr. *M. L. Agarwala*, for the appellants.

Munshi *Narain Prasad Ashthana* and Munshi *Baleshwari Prasad*, for the respondents.

BOYS, J.—This appeal raises the hitherto much debated question as to the effect of the non-registration of a document presented to a mutation court asking for the names of the applicants to be entered in a particular way and at the same time setting forth in one form or another that the parties have come to an agreement between

* Second Appeal No. 437 of 1925, from a decree of K. A. Sams, District Judge of Ghazipur, dated the 3rd of December, 1924, confirming a decree of Raja Ram, Additional Subordinate Judge of Ballia, dated the 12th of December, 1923.

(1) (1916) 19 Oudh Cases, 75; (2) (1925) I.L.R., 48 All., 213. 85 Indian Cases, 770.
(3) (1914) I.L.R., 42 Calc., 801.

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Boys, J.

themselves. The document in question says that the parties have consulted amongst themselves (*musalehat hui*) to the effect that certain areas of land shall remain in the possession of the several applicants respectively; that they will be liable for their own shares of the rent and shall have no concern with each other's shares and they will be bound by this *sulehnamah*. After setting forth these facts they pray that entry may be made in the revenue records in accordance therewith.

Entry in the revenue records was made accordingly and for some nine or ten years the parties have acted on this arrangement. We have been referred to some 12 or 15 decisions of this Court, and I have carefully examined these and a number of others. It is not necessary to re-state the old arguments on this side and on that, which have been urged many times over and reported in many decisions. It is clearly possible to pick out isolated words and phrases in this document which, it may be argued, indicate, though perhaps indefinitely, a declaration of title. I am putting it in the most extreme way in the plaintiff's favour. On the other hand I agree wholly with the view of Mr. Justice LINDSAY, then Judicial Commissioner of the Oudh Court, reported in *Satrohan Lal* v. *Nageshwar Prasad* (1). It is desirable in my opinion, not to found a decision in these cases on a particular phrase here and there, but to take a broad view of the circumstances under which the particular document was written, and then, keeping in mind that broad view, to determine the matter in accordance with the principles laid down in the case to which I have referred and which are in essentials the principles adopted by the same Judge and by Mr. Justice SULAIMAN in *Bakhtawar* v. *Sundar Lal* (2). Taking the facts of this case broadly, it is clear that there was a dispute between the plaintiffs and defendants, each of them claiming to be

(1) (1916) 19 Oudh Cases, 75; (2) (1925) I.L.R., 48 All., 213. 35 Indian Cases 770.

entitled to the property of the deceased. Mutation proceedings commenced and they were settled between the parties. There is nothing whatever to show that there would have been any necessity for a document being drawn up between the parties at all, but for the fact that it was necessary to secure the termination of the mutation proceedings and necessary to secure that termination in conformity with the arrangement arrived at between the parties. For this purpose it was necessary to set forth the terms upon which the parties had come to an agreement in reference to the particular matter of the entry of their names against particular portions. I would further refer to the decision of their Lordships of the Privy Council in *Mahomed Musa* v. *Aghore Kumar Ganguly* (1). Applying the principles of those cases and more especially the principles set out in the judgements of Mr. Justice LINDSAY and Mr. Justice SULAIMAN, I would hold that the document in question was prepared merely with a view to indicating to the revenue court the manner in which the parties had agreed that their names should be entered. I think it would be wrong to hang, upon the phrases that the parties would pay their own shares of the rent and be bound by the terms upon which they had agreed as set out in the document, a finding that the document created or declared a title. As to the meaning of the term " declares " reference may be made to the judgement of Mr. Justice LINDSAY at page 774 of the case *Satrohan Lal* v. *Nageshwar Prasad* (2).

I would, therefore, dismiss the appeal with costs.

SULAIMAN, J. :—I fully agree.

Appeal dismissed.

(1) (1914) I.L.R., 42 Calc., 801.

(2) (1916) 19 Oudh Cases, 75 35 Indian Cases, 770.

REVISIONAL CRIMINAL.

Before Mr. Justice Lindsay.

1927
April, 27.

EMPEROR *v.* LODAI.*

Act No. IX of 1890 (*Indian Railways Act*), *sections* 3(4) *and* 122—"*Railway*"—*Staff-quarters not part of a* "*railway*" *within the meaning of section* 3(4).

Staff-quarters or any building of a residential character, though they may be on railway land, cannot be deemed to be a part of a "railway" within the meaning of section 3(4) of the Indian Railways Act, 1890.

Where a person was found playing cards at the house of a railway employee, situated between two railway lines, and there was no evidence to show that his entry on these premises was unlawful: *held*, that he could not rightly be convicted under section 122 of the Railways Act. *Margam Aiyar* v. *Mercer* (1), referred to.

THIS was a reference made by the Additional Sessions Judge of Mirzapur. The facts of the case sufficiently appear from the Sessions Judge's order.

Munshi *Kumuda Prasad*, for the applicant.

The Assistant Government Advocate (Dr. *M. Waliullah*) for the Crown.

The following is the *Referring Order*:—

"The applicant was tried summarily by the Magistrate and was fined Rs. 10 under section 122 of the Indian Railways Act (IX of 1890).

Two things are necessary to bring a man under that section, (1) that the place of entry must be 'railway' as defined in section 1(*b*) of the Act and (2) the entry should have been unlawful in the inception. If the entry was not unlawful in the beginning, neither part of the section 122 of the Act would apply.

From the judgement of the learned Magistrate it is clear that the place where the accused was found is occupied as quarters by the railway employees. In *Margam Aiyar* v. *Mercer* (1), it was found by a Division Bench of the Madras High

* Criminal Reference No. 232 of 1927.
(1) (1914) 23 Indian Cases, 177.

Court that 'Staff-quarters or any building of a residential character cannot be deemed to be part of a railway' within the meaning of section 3 (4) of the Act, and so a conviction under section 122 of the Act was set aside against the accused in that case. The fact that the place happens to be between two lines makes no difference in this case, as the lines by themselves are quite apart and there can be even private land between the lines.

As regards the second point also there is no evidence at all to show that the entry of the applicant was unlawful in the beginning. The learned Magistrate has presumed too much. He has not referred in his judgement to any evidence to show that the accused had gone to the place with the object of gambling. The Station Master does not prove it. What he says is that when he went there some persons who were there ran away and an empty card case was found. It is a long jump to presume from an empty card case that there was a pack of cards also there, and if it was, it was used for gambling. Playing of cards is an innocent pastime in all classes of people in this country. Mere playing of cards is no offence under the Gambling Act and if a friend of an employee of a railway company asks his friends to play with cards at his house, he thereby commits no offence, nor the entry of such friends becomes unlawful under section 122 of the Act. Such invitations are the order of the day even among the society people and it would act very hardly if such invitations are held to be illegal. Nor does the fact that some other people ran away raise any presumption against the applicant who remained on the spot. Other people's conduct is not at all mentioned by the Station Master in his report nor was the accused called upon to answer that charge. I think this conviction should be set aside on both the grounds: (1) that the section 122 of the Act did not apply to the locality as it did not come under the definition of railway and (2) that the learned Magistrate had no legal evidence before him to prove that the entry of the applicant was unlawful. Let the record be sent to the Hon'ble High Court with the recommendation that the conviction of the petitioner be set aside, along with any explanation the learned Magistrate may think proper to submit."

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EMPEROR v. LOMAL.

LINDSAY, J. :—For the reasons given in the order of the Additional Sessions Judge I accept the reference in this case and direct that the conviction of the petitioner be set aside and that the fine, if paid, be refunded.

Reference accepted.

APPELLATE CIVIL.

Before Mr. Justice Sulaiman and Mr. Justice Banerji.

1927
April, 27.

JAIKARAN SINGH AND OTHERS (DEFENDANTS) *v.* SHEO KUMAR SINGH (PLAINTIFF) AND MUSAMMAT KAULRAJI KUAR (DEFENDANT).*

Mortgage—Redemption—Mortgaged property sold for arrears of rent which the mortgagee was bound to pay—Purchase by mortgagee—Equity of redemption not lost.

The mortgagee of a fixed rate holding, who was under a covenant to pay the rent of the holding to the zamindar, made default in such payment, in consequence of which the holding was sold, and it was purchased by the mortgagee himself. *Held*, that the mortgagee could not by his own wrongful act deprive the mortgagor of his rights, and the mortgagor's equity of redemption still subsisted. *Nawab Sidhee Nazur Ally Khan* v. *Rajah Ojoodhyaram Khan* (1), *Kalappa bin Giriappa* v. *Shivaya bin Shivlingaya* (2) and *Babaji* v. *Magniram* (3), referred to.

THE facts of this case are fully stated in the judgement of the Court.

Babu *Piari Lal Banerji*, for the appellants.

Pandit *K. N. Laghate*, for the respondents.

SULAIMAN and BANERJI, JJ.—This is a defendants' appeal arising out of a suit for redemption. The plaintiff's predecessor, Ram Kumar, made three usufructuary mortgages of his fixed rate tenancy in succession. In April, 1888, he mortgaged about 6 bighas and odd to Hakim Singh for Rs. 272 which was redeemable in 1302

* Second Appeal No. 560 of 1925, from a decree of K. G. Harper, District Judge of Benares, dated the 6th of January, 1925, confirming a decree of Ali Ausat, Subordinate Judge of Jaunpur, dated the 3rd of November, 1924.

(1) (1866) 10 Moo., I.A., 540. (2) (1895) I.L.R., 20 Bom., 492.
(3) (1895) I.L.R., 21 Bom., 396.

Fasli. In November, 1888, he mortgaged another 8 bighas and odd of his fixed rate tenancy to Sheo Mangal for Rs. 550, which was redeemable in 1306 Fasli. About 2 bighas and odd of the holding still remained in the possession of the mortgagor. In 1894 he mortgaged the entire holding for a sum of Rs. 1,352 to Nand Kumar. He left out of the mortgage-money Rs. 272 for payment of the first mortgage in 1302 Fasli and Rs. 550 for payment of the second mortgage in 1306 Fasli. It was agreed between the mortgagor and the mortgagee Nand Kumar, that the latter should redeem the prior mortgages and after paying the rent due to the zamindar should appropriate the profits in lieu of interest. It is quite clear that if all the parties had stuck to their agreements, the tenant mortgagor would not have been liable to pay any rent whatsoever after the year 1894. The first two mortgagees were liable to pay rent in proportion to the areas in their possession and the remainder was mortgaged to Nand Kumar who became liable to pay rent in proportion. It is also apparent that if Nand Kumar had redeemed Hakim and Sheo Mangal, he would have obtained possession of the entire holding and would have paid the entire rent to the zamindar. In either case, the tenant mortgagor, after the mortgage of 1894, was relieved of his duty to pay any rent to the zamindar, though of course as regards the zamindar his liability to him in the eye of the law remained.

Default was undoubtedly made by all the three mortgagees and the zamindar brought a suit for arrears of rent of 1304, 1305 and 1306 and a part of 1307 Fasli. He impleaded not only the tenant-mortgagor, but all the three mortgagees, and the revenue court passed a decree against all of them. It made the tenant and the first two mortgagees liable for rent up to 1306 Fasli and made the mortgagor and the first and the third mortgagees liable for the rent for 1307 Fasli. The fact was

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that in Jeth, 1306 Fasli, Nand Kumar, the third mortgagee, redeemed the second mortgage in favour of Sheo Mangal. Sheo Mangal was thus not made liable for any part of the rent for 1307 Fasli.

About Rs. 80 only were paid in satisfaction of the decree and for the balance the decree was executed. At first the area in the possession of Hakim Singh was put up for sale and purchased by a man named Ajodhia, who was a servant of Nand Kumar. Hakim Singh put in an objection that he had paid his share of the decree and that the sale had been brought about by Nand Kumar in collusion with the qurq-amin. In the meantime Ram Kumar died. This first sale was actually set aside. Subsequently the whole of the tenancy was put up for sale and purchased in the name of Ram Autar. Both the courts below have found that this man was a cart-driver of the mortgagee Nand Kumar, and that the purchase by Ram Autar was in fact *benami* for Nand Kumar. In fact subsequently when Ram Autar died, his widow transferred the property to the heirs of Nand Kumar. This sale was duly confirmed.

The heirs of the mortgagor, Ram Kumar, have brought the present suit for redemption against the heirs of the third mortgagee, Nand Kumar. Both the courts below have decreed the claim. The defendants contend that inasmuch as the sale of the equity of redemption was effected and confirmed, no right vests in the heirs of Ram Kumar and no suit for redemption is maintainable. The argument on their behalf is that the auction-sale not having been set aside, it cannot now be questioned and the defendants must be deemed to have acquired the rights of the mortgagor absolutely.

In our opinion, the mortgagor, Ram Kumar, was in equity not liable to pay rent to the zamindar when he had made the three mortgages and contracted with these

mortgagees that they would pay rent direct to the zamindar. The default, if any, was entirely that of the mortgagees. We have already remarked, as has been actually found by the first court, that Hakim Singh had paid his quota of the decretal amount. There was, therefore, no longer any default by Hakim Singh. Even if there had been default by Hakim Singh, we would still hold that it being the duty of Nand Kumar to redeem Hakim Singh and get into possession and pay rent, Nand Kumar would also be responsible for any arrears of rent that might be due from Hakim Singh. This must be the true position as against the mortgagor, Ram Kumar.

As regards Sheo Mangal Singh, it was again the duty of Nand Kumar to redeem him and to pay rent to the zamindar. Nand Kumar did actually redeem Sheo Mangal in Jeth, 1306 Fasli. There is no direct evidence on the record to show under what terms the redemption took place, but we are entitled to presume that all accounts were settled between the parties and that after Sheo Mangal was redeemed, Nand Kumar stepped into his shoes and undertook all liabilities. That explains why the revenue court did not make Sheo Mangal liable for any rent for the subsequent period of 1307 Fasli. Although, therefore, the zamindar had obtained a decree jointly against his tenant and his mortgagees, it is apparent that in equity the mortgagor was not really liable, and that if he were made to pay anything to the zamindar, he would have equities against his mortgagees who had in fact committed default. A wrong was, therefore, committed by Nand Kumar, admittedly as regards part of the decree, and in our opinion as regards the whole amount due, and it was in consequence of that wrong that the tenancy was put up for sale and sold. Fortunately for the mortgagor, the property was actually purchased by the mortgagee himself who had committed the wrong.

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The question before us now is whether the heirs of the mortgagor can still claim a right to redeem the property. Technically speaking, their property has been sold at auction, but in equity it was sold on account of the wrong committed by the very person who has purchased the property. In the case of *Nawab Sidhee Nuzur Ally Khan* v. *Rajah Ojoodhyaram Khan* (1) their Lordships of the Privy Council held that a mortgagee who had wilfully suffered an estate to fall into arrears of Government revenue and then had entered into an agreement with another person to bid for the estate when sold at auction, was estopped from saying that the equity of redemption did not subsist. The principle underlying that case was followed by a Bench of the Bombay High Court in the case of *Kalappa bin Giriappa* v. *Shiraya bin Shivlingaya* (2), where also, when a mortgaged property was sold at a Government sale for arrears of revenue owing to the mortgagee's default, it was held that it did not affect the mortgagor's right to redeem. The same principle was adopted by the same High Court in the case of *Babaji* v. *Magniram* (3). It seems to us that these cases lay down a sound principle of law which prevents a fraud being practised on innocent parties. If property is sold owing to the wrongful act and default of the mortgagee himself, he cannot be allowed to claim it on the ground of his own wrong, for no cause of action can arise out of the wrong. In our opinion the mortgagee undoubtedly committed a breach of his contract when he made default in paying the rent due to the zamindar. He cannot, therefore, be allowed to gain advantage out of his own breach of that contract.

We accordingly uphold the decree of the court below and dismiss the appeal with costs.

Appeal dismissed.

(1) (1866) 10 Moo., I.A., 540. (2) (1895) I.L.R., 20 Bom., 492.
(3) (1895) I.L.R., 21 Bom., 396.

FULL BENCH.

Before Justice Sir Cecil Walsh, Mr. Justice Mukerji and Mr. Justice Banerji.

PARSOTAM SARAN (OBJECTOR) *v.* BARHMA NAND AND OTHERS (OPPOSITE PARTIES).*

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April, 27.

Civil Procedure Code, order XLI, rule 5—Execution of decree —Stay order passed by appellate court—Sale held in ignorance of the order—Validity of sale.

Where a subordinate court went on with the execution of a decree and sold certain property in ignorance of the fact that an order for stay had been passed by the High Court, and the property was purchased by a third party, it was *held* that, there being no other objection, the sale must stand. *Sahu Nand Kishore* v. *Shadi Ram* (1), distinguished. *The Ganges Flour Mills Co.* v. *Shadi Ram* (2), *Nonidh Singh* v. *Musammat Sohun Kooer* (3), *Mian Jan* v. *Man Singh* (4), *Maijha Singh* v. *Jhow Lal* (5), *Sant Lal* v. *Umrao-un-nissa* (6), *Bessesswari Chowdhurany* v. *Harro Sundar Mozumdar* (7), *Hukum Chand Boid* v. *Kamalanand Singh* (8), *Muthu Kumarasami Rowther* v. *Kuppusami Aiyangar* (9), *Ramanathan Chetty* v. *Arunachellam Chetty* (10), and *Venkatachalapati Rao* v. *Kameswaramma* (11), referred to.

Per MUKERJI, J.—The principle of *stare decisis* does not apply, as the question raised is not of substantive law but of procedure alone.

In this case an order *ex parte* was made by a Judge of the High Court, probably between 10 and 11 o'clock in the morning on the 21st of January, 1924, staying a sale. The sale in question was fixed to take place after 12 on the 21st of January and, therefore, probably took place after the order of the Judge on the same day. The order

* First Appeal No. 1 of 1926, from a decree of Ganga Nath, Subordinate Judge of Moradabad, dated the 29th of August, 1925.

(1) (1926) 24 A.L.J., 519. (2) (1917) 16 A.L.J., 46.
(3) (1872) N.W.P. H.C.R., 135. (4) (1880) I.L.R., 2 All., 686.
(5) (1874) N.W.P. H.C.R., 354. (6) (1889) I.L.R., 12 All., 96.
(7) (1892) 1 C.W.N., 226. (8) (1905) I.L.R., 33 Calc., 927.
(9) (1909) I.L.R., 33 Mad., 71. (10) (1912) I.L.R., 38 Mad., 765.
(11) (1917) I.L.R., 41 Mad., 151.

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was not communicated to the court, or, at any rate, the court below did not receive notice of the order until the 23rd of January. That was too late to prevent the sale taking place, because it had already taken place and the property had been purchased by a third party. There was no valid objection to the sale on the merits, but objection was taken that the sale was invalid, having taken place after the order of stay of the 21st of January above referred to. The order of stay was obtained *ex parte*, that is to say, behind the back of the other side, at a time when the applicant knew quite well that any order which was made could not be communicated to the court below in time to prevent the sale. On that ground, on the 27th of February, 1924, a two Judge Bench of this Court held that the application in the presence of the other side to grant the stay must be rejected because the sale had taken place already. The executing court refused to set aside the sale. The objector thereupon appealed to the High Court. This appeal coming before a Bench of two Judges was referred to the CHIEF JUSTICE for the appointment of a larger bench, in view of the decision in *Sahu Nand Kishore* v. *Shadi Ram* (1).

Munshi *Shambhu Nath Seth*, for the appellant.

Dr. *Kailas Nath Katju* and Maulvi *Mukhtar Ahmad*, for the respondents.

MUKERJI, J.—This appeal has been referred to a Bench of three Judges at the instance of the learned Judges who first heard it. The reason for the reference was that they felt doubtful about the soundness of the case of *Sahu Nand Kishore* v. *Shadi Ram* (1).

The question for decision is whether, in the circumstances of the case, the stay order passed by the High Court should have the effect of nullifying a sale that was held before the order of this Court could be communicated

(1) (1926) 24 A.L.J., 519.

either to the court below or to the officer conducting the sale.

The facts of the case are given in the referring order and I will mention them very briefly, only in order to indicate the precise point I have to decide. The judgement-debtor, who is the appellant before this Court, filed certain objections to the execution of a decree held against him by the decree-holders respondents. His objection was dismissed by the execution court on the 12th of January, 1924. The date fixed for sale in execution of the decree was the 21st of January, 1924. On the same 21st of January, the judgement-debtor, on the strength of his having filed an appeal against the order of the 12th of January, 1924, put in an application for stay of the sale fixed for the same day. Apparently, the attention of the learned Judge was not drawn to the fact that the sale was going to be held on the very day he was passing the order, for, otherwise, I take it, he would not have made an order the compliance with which would have been practically impossible. The stay was granted and was to be till the disposal of the hearing of the rule issued. When the rule was returned, the Judges made the following order :—" The sale having already taken place, no stay order can be passed now. The application is accordingly rejected."

The sale advertised for the 21st of January, 1924, took place in due course. The purchaser was a person other than the decree-holder. The judgement-debtor applied in the court below for setting aside the sale on various grounds, with only one of which we are concerned. His other grounds for setting aside the sale were not substantiated. The present ground did not find favour with the court below.

The appellant's contention is that the mere fact that this Court ordered the stay of the sale was sufficient to

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Mukerji, J.

make the sale a nullity. It is argued that it was not necessary for the stay order to take effect that it should have been communicated, either to the court below, or to the officer conducting the sale. The appellant takes his stand on the ruling in *Sahu Nand Kishore* v. *Shadi Ram* (1), already mentioned.

The question raised has been a subject-matter of much difference of opinion in various courts. In this Court the opinion has been, mostly, in the appellant's favour and it was argued on that account that on the principle of *stare decisis* we should follow previous cases. In my opinion this principle does not apply. It is not a question of substantive law, on a particular interpretation of which titles have been acquired. It is a question of procedure alone and any cases that may come up in future for decision will be decided according to our present judgement, if we happen to differ from the previous cases.

It appears that in this Court cases have been decided on two grounds. In some cases it has been said that the very fact of an appellate court passing an order for stay of execution took away the jurisdiction of the lower court to proceed with the execution and that, therefore, the sale must be treated as a nullity. In other cases the ground for decision has been this: Although the appellate court's order has not been communicated to the court below or to the sale officer, it is *possible* that the fact of the passing of such an order has been spread as a rumour and possible bidders have refused to bid to the full value of the property. It appears to me that the second ground for setting aside a sale is based on a presumption of fact and is different from the question of law before us. It has been found in this case, as a fact, by the court below, that there was no irregularity in publishing or conducting the sale. There is no

(1) (1926) 24 A.L.J., 519.

finding that the order of stay was known to anybody bidding at the sale. Indeed, in the circumstances of the present case, the presumption of fact is that the order was not known to anybody present at the sale. Let us, however, go a little deeper into the question of rumour. A rumour has not always got the truth for its foundation. It may turn out to be true, and it may turn out to be false. When an application for stay of execution is actually rejected, a rumour may be afloat that it has been granted. It is, therefore, unsafe to base any conclusion of law on a mere surmise that a rumour as to the *truth* may have reached the bidders. If, however, it be established that one of the parties to the execution has been responsible for the spread of a rumour which has prejudiced the other party, the sale will probably be set aside on the ground of fraud or other personal grounds such as estoppel, etc. Each case will have to be dealt with on its own facts. It is unsafe to lay down a general rule, a rule of law, on a pure surmise as to *facts*.

That being so, we have to examine only those authorities which lay down that the mere passing of an order for stay was sufficient to oust the authority of the executing court to proceed with the execution.

The cases cited are numerous and are :—

Nonidh Singh v. *Musammat Sohun Kooer* (1), *Mian Jan* v. *Man Singh* (2), *Maijha Singh* v. *Jhow Lal* (3), *Sant Lal* v. *Umrao-un-nissa* (4), *The Ganges Flour Mills Co., Ltd.* v. *Shadi Ram* (5) and *Sahu Nand Kishore* v. *Shadi Ram* (6).

I have examined each and every one of these cases, but I am not satisfied that any proper principle has been laid down in the cases which have been decided in a

(1) (1872) N. W. P. H. C. R., 135. (2) (1880) I. L. R., 2 All., 686.
(3) (1874) N. W. P. H. C. R., 354. (4) (1889) I L. R., 12 All., 96.
(5) (1917) 16 A. L. J., 46. (6) (1926) 24 A. L. J., 519.

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manner the appellant would want us to decide his case. In Calcutta there are two cases:—

Bessesswari Chowdhurany v. *Harro Sundar Mozumdar* (1) and *Hukum Chand Boid* v. *Kamalanand Singh* (2).

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In Madras there are three cases:—

Muthukumarasami Roether v. *Kuppusami Aiyangar* (3), *Ramanathan Chetty* v. *Arunachellam Chetty* (4), and *Venkatachalapati Rao* v. *Kameswaramma* (5).

The Calcutta cases are conflicting. The two earlier Madras cases hold conflicting views and the law has been settled there by the Full Bench case in 41 Madras.

In the recent cases, in which it has been held that by the appellate court making an order for stay the lower court's authority to execute its own decree is superseded, reliance has often been placed on American authorities and specially on Freeman's book. One of the learned Judges deciding the case in 41 Madras has pointed out that the American rule is based on the peculiar law obtaining in some of the States and is not a safe guide to us in India.

In such state of authority I think it safe to rely on general principles and on the language of the law. The law is contained in order XLI, rule 5, of the Code of Civil Procedure and lays down that the mere filing of an appeal shall not operate as a stay of proceedings, but the appellate court may order stay of execution. Now, when an appellate court orders stay of execution it gives a direction to somebody. The execution is not in the hands of the appellate court. It has to tell the court of first instance that it is to stay its hand in the execution of its decree. It necessarily follows that if the lower court has no information

(1) (1892) 1 C. W. N., 226.
(2) (1905) I. L. R., 33 Calc., 927
(3) (1909) I.L.R., 33 Mad., 74.
(4) (1913) I. L. R., 38 Mad., 766.
(5) (1917) I. L. R., 41 Mad., 151.

of the order of the appellate court it cannot stay execution and the execution must proceed. What principle, then, is there on which we are bound to hold that what was done in perfect good faith and in possession of clear jurisdiction becomes null and void solely because, unknown to the court below, an order had been passed? Taking analogy from general life; if *A* directs his agent *B* to purchase a ton of wheat from *C* and then countermands his order and if *B*, before he receives the subsequent order of *A*, makes the purchase from *C*, can it be contended with any show of reason that the purchase by *B* is not binding on *A*? The court does nothing beyond selling the judgement-debtor's property on behalf of the judgement-debtor. It only carries out what the judgement-debtor is morally bound to do. When a sale proclamation is made, it is announced to the world that, on such and such day, such and such property will be sold to the highest bidder. The public are invited to come and bid. If an innocent third party makes the purchase, will there be any moral justification for the court to say, later on, that he would not have his money's worth, although he took so much trouble to procure the money, to come to the place of sale and to bid, simply because there was an unknown order passed before the sale? On moral grounds such a procedure will have to be condemned. In this connection I would like to cite the observations of their Lordships of the Privy Council in the case of *Kala Mea* v. *Harperink* (1), at the last page. Their Lordships clearly call the sale officer an "accredited agent of the court."

If, then, I am right in saying that a stay order is nothing but an order directing somebody to do an act, that order can have no effect on the action of the person so directed, till the party has learnt what his instructions are. It is not merely sufficient to say that the officer

(1) (1908) I. L. R., 36 Calc., 323, 334.

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conducting the sale is to be held blameless for his conduct. That goes without saying. There could be no possibility of charging such an officer with misbehaviour. We must go further and say that the act of the officer or the lower court is good and valid for the simple reason that they never knew that they were directed to act in a different way.

There is no question of any dignity of the appellate court nor is there any question of jurisdiction involved. When the lower court sells or delivers possession in execution of a decree, it commits no disrespect to the appellate court if it is not aware that the appellate court has ordered otherwise. Our law does not take away the jurisdiction of the court of first instance to execute its own decree, on the ground that an appeal has been filed. On the other hand, it *positively affirms* the proposition that such a jurisdiction subsists. The question has, therefore, to be decided on general principles and on a common sense view of things. It is true that certainty is very often convenient, but you cannot apply a rule like that everywhere. Instances may be framed where it is dangerous to apply it.

In the case of *The Ganges Flour Mills Co. Ld.* v. *Shadi Ram* (1), a stay order was obtained on misrepresentation of facts, but the sale took place because the order could not be communicated in time to the proper quarters. The stay order was, later on, set aside on the ground that it had been obtained by fraud. It was held that the sale was good in spite of the stay order. If the rule of certainty had been applied it should have been held that the sale was bad because there was the certain and clear order for its stay. The facts in the case of *Sant Lal* v. *Umrao-un-nissa* (2) were different In that case there was no order of the appellate court, but the executing court itself had ordered a stay at the last moment. It was held that the power of the sale

(1) (1917) 16 A.L.J., 46. (2) (1889) I.L.R., 12 All., 96.

officer to sell was derived from the court and the court's order of stay deprived him of that power. In this case, it is not necessary to say whether *Sant Lal's* case was rightly decided. But if it were necessary to decide the point, I should hold, with respect, that it did not lay down good law. It is undoubtedly true that the sale officer derives his authority to sell from the court. But so do all agents from the principal. But who has ever heard that the principal is not bound by the agent's act, if the agent is unaware of the fact that his authority has been revoked? A sale officer acts on behalf of the court and is, to the extent of his duties clearly defined, the court's agent. The court is bound to confirm a sale except under circumstances well defined. It has no arbitrary power to set aside a sale under all circumstances. If, then, it is urged that the mere fact that a stay order (uncommunicated) was made, made the sale illegal, some better reason must be found than that the officer became *functus officio* without his knowing this.

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Broadly speaking, an order for stay of sale is passed by a court executing a decree, on three grounds. First, where it is found on an inquiry under order XXI, rule 58, of the Civil Procedure Code that the property attached and sold belongs to a third party. In such a case, if the sale has really taken place, it will be set aside on the ground that the property sold did not belong to the judgement-debtor and that, therefore, the court could not sell it. In such a case it will probably be open to the purchaser to have it established in a suit that the property did belong to the judgement-debtor and was rightly sold. The second case where the stay is ordered is where the court is apprised of some serious defect in the proceedings. For example, it may be shown that the property has been materially misdescribed, or an incumbrance has been proclaimed that does not exist. In such cases the sale would be set aside on the ground

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of material irregularity in publishing or conducting the sale, provided the defect has led to substantial loss in the price fetched. The third class is where the judgement-debtor appears late and either on part payment of the decree money or with the consent of the decree-holder successfully persuades the court to pass a stay order. In such cases there would be no ground for setting aside the sale.

A clear and substantial distinction must be drawn between cases where the decree-holder has made the purchase and where the purchaser is a third party acting in good faith. The decree-holder cannot shake off his character as such merely by reason of his auction-purchase, and he is bound by all orders passed in the case. A stay order, therefore, will operate against him and it may be that a purchase by a decree-holder will be set aside on the mere ground of the passing of a stay order. On the same principle, where a sale is held in execution of an *ex parte* decree, the fact that the decree was subsequently set aside at the instance of the defendant does not affect the title of a third party purchaser, though it does affect the title of the plaintiff, if he makes the purchase. For a party to a proceeding must take subject to all orders passed in the case.

In the case of *Sahu Nand Kishore* v. *Shadi Ram* (1), the decree-holder purchased one of the properties and the other was purchased by a third party.

On the above grounds I have no hesitation in holding that the lower court was right and the appeal should be dismissed with costs, the sale being perfectly good.

WALSH, J.—I entirely agree for the reasons given by my learned brother and for those already given in our referring order.

BANERJI, J.—I agree that the sale was a good sale.

Appeal dismissed.

(1) (1926) 24 A.L.J., 519.

APPELLATE CIVIL.

Before Mr. Justice Mukerji and Mr. Justice Boys.

BAIJ NATH PRASAD AND OTHERS (DEFENDANTS) *v.* NARAIN PRASAD AND OTHERS (PLAINTIFFS).* 1927 *April*, 28.

Civil Procedure Code, order XXIII, rule 3; schedule II, paragraph 16 (1)—Arbitration—Award—Decree passed without allowing time for filing objections—Appeal.

The parties to a pending suit appeared before the court and stated that they would accept the statement which three pleaders of the court, whose names were mentioned, would make without taking oath, or, if they were not unanimous, the statement of the majority. The pleaders were to decide all the points in dispute among the parties and were also to dispose of the question of costs. On this statement of the parties being recorded, the court referred the case to the three pleaders. The pleaders, after several adjournments, filed a long statement in writing, and thereupon the court proceeded at once to decide the case in accordance with the statement, and, on judgement being given, a decree followed.

Held, that the proceeding was not an agreement or compromise, to which order XXIII, rule 3, of the Code of Civil Procedure would apply, but was an arbitration. Taking it as an arbitration, the court was wrong in not allowing the parties time for filing objections, and an appeal would lie from its decree. *Tursi Ram* v. *Basdeo* (1), *Muhammad Asghar Ali Khan* v. *Muhammad Imtiaz Ali* (2), and *Himanchal Singh* v. *Jatwar Singh* (3), referred to.

THIS was an appeal by some of the defendants. The suit out of which it arose was one for partition. On the 24th of January, 1924, some of the parties and the counsel for others appeared before the court and stated that they would accept the statement which the three pleaders of the court, whose names were mentioned,

* First Appeal No. 395 of 1924, from a decree of Sarup Narain, Second Subordinate Judge of Cawnpore, dated the 9th of April, 1924.

(1) (1926) 24 A.L.J., 705. (2) Weekly Notes, 1898, p. 200.
(3) (1924) I.L.R., 46 All., 710.

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would make without taking oath. They agreed that if the pleaders were not unanimous in the making of the statement, the statement of the majority would prevail. The pleaders were to decide all the points in dispute among the parties and were also to dispose of the question of costs. On this statement of parties being recorded, the court referred the case to the three pleaders. The pleaders took time frequently, and ultimately on the 9th of April, 1924, made an application to the court saying that the statement they had intended to make was a long one and it would be much better if they filed a written statement. They accordingly on that very date filed a written statement.

On this statement being filed, the court at once proceeded to decide the case in accordance with the statement. On the judgement being given a decree followed, and it was against this decree that the appeal was filed.

Some of the defendants, on the 22nd of April, 1924, filed objections to the decision of the three pleaders. The court treated the objections as applications for review and realized court-fee stamp accordingly. Ultimately the applications were dismissed for default on the 13th of December, 1924. In the meanwhile, on the 19th of November, 1924, this appeal had been filed.

Munshi *Narain Prasad Ashthana* and Munshi *Binod Bihari Lal*, for the appellants.

Munshi *Shiva Prasad Sinha*, for the respondents.

THE judgement of MUKERJI, J., after stating the facts as above, thus continued:—

It is contended on behalf of the appellants that the whole proceeding in the court below was in the nature of an arbitration, that the so-called written statement of the referees was nothing but an award, and, therefore, the court was bound to give the appellants 10 days' time to

file objections to the award. It was argued in the alternative that if the application of the 24th of January, 1924, together with the " written statement " of the three pleaders be regarded as an " adjustment of the suit ", then such an adjustment could not be accepted by the court without the sanction of the court to it.

On behalf of the respondents the learned counsel argued that the proceedings in the court below were neither an adjustment nor an arbitration, but it was something different altogether. He referred us to certain cases in which it appears that where the parties agreed to be bound by the statement of a certain third party, it was held that the statement should be accepted as binding on them, whether any oath was taken by the party making the statement or not. One of the cases is *Muhammad Asghar Ali Khan* v. *Muhammad Imtiaz Ali* (1), another case is *Himanchal Singh* v. *Jatwar Singh* (2). Neither of these cases has any clear application to the facts before us. On our reading of order XXIII, rule 3, of the Code of Civil Procedure, we do not regard the whole procedure as an adjustment by the parties of their differences " by any lawful agreement or compromise ". We understand that rule 3 of order XXIII refers to cases where the parties themselves come to an agreement. It may be that they asked some third person to settle their difference, and on that person giving an opinion the parties accepted it as good enough for themselves. In such cases it is the unity of the minds of the parties that constitutes the adjustment. In the case before us the parties referred a very complicated suit for partition to the decision of three gentlemen who had nothing whatsoever to do with the families of the parties. Their " written statement " shows that they themselves regarded their functions as those of arbitrators, for they say : " We had to decide the dispute of each

(1) Weekly Notes, 1898, p. 200. (2) (1924) I.L.R., 46 All., 710.

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party separately and to inspect and examine the *bahis*, which took considerable time." We are of opinion, therefore, that the whole proceeding was one of arbitration. The reference, though oral, was reduced into writing and it was signed by or on behalf of all the parties. The award is in writing and is signed by the arbitrators.

That being so, the question is whether an appeal lies. In *Tursi Ram* v. *Basdeo* (1), decided by the present Bench, an award was made by certain arbitrators and on it being sent back to the arbitrators they refused to re-consider it. The learned Judge accepted the award although the arbitrators had refused to re-consider it and made a decree on foot of that award. This Bench held that that was an award the finality of which was not contemplated by law. Stress was laid especially on the language of clause (2) of paragraph 16 of schedule II of the Civil Procedure Code. The same principle applies, and we are of opinion that the award in the present case is not final, it not having been pronounced in the circumstances mentioned in clause (1) of paragraph 16 of schedule II to the Code of Civil Procedure.

There can be no doubt that the learned Subordinate Judge should have allowed the parties ten days' time to object to the award. After considering the objections, if any, it was open to the learned Judge to accept the award if he saw no reason to remit it and then to make a decree on foot of the award. We must now direct the learned Subordinate Judge to take up the matter from the stage at which the case arrived properly.

We allow the appeal, set aside the decree of the court below and remit the case to the learned Subordinate Judge with the direction that he should re-admit the suit on its original number in the register and dispose of it

(1) (1926) 24 A.L.J., 705.

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according to law. Costs here and hitherto will abide the result.

BOYS, J.—I would only add that there is to my mind striking difference between the phraseology of order XXIII, rule 3, and paragraph (1) of the second schedule relating to arbitration. Order XXIII, rule 3, clearly and very strikingly deals with an agreement which has been arrived at, while the main agreement to be arrived at under the arbitration paragraph is an agreement which is to be arrived at in the future.

Appeal allowed and cause remanded.

Before Mr. Justice Iqbal Ahmad and Mr. Justice Kendall.

SHEOAMBAR SINGH AND ANOTHER (PLAINTIFFS) *v.* SHEOAMBAR SINGH (DEFENDANT).*

1927
April, 28.

Act (Local) No. II of 1901 *(Agra Tenancy Act), sections* 95 *and* 167—*Act (Local) No. III of* 1901 *(United Provinces Land Revenue Act), section* 42—*Suit for a declaration that defendant is a trespasser—Effect of previous decision of a revenue court as to defendant's status.*

In proceedings under section 42 of the United Provinces Land Revenue Act, 1901, to which the zamindar was a party, a revenue court decided that the defendant was a non-occupancy tenant, and the zamindar made no appeal against this decision. Subsequently, the zamindar sued in a civil court for a declaration that the defendant was a trespasser. *Held*, that the suit could not be maintained, the previous finding of the revenue court that the defendant was a non-occupancy tenant being binding upon the plaintiff. *Jagannath* v. *Balwant Singh* (1), referred to.

THE facts of this case sufficiently appear from the judgement of the Court.

Pandit *Uma Shankar Bajpai*, for the appellants.

* Second Appeal No. 598 of 1925, from a decree of Abdul Halim, Second Additional Subordinate Judge of Cawnpore, dated the 23rd of December, 1924, confirming a decree of Shri Nath, Officiating Munsif of Fatehpur, dated the 22nd of December, 1923.

(1) (1922) I.L.R., 44 All., 692.

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Munshi *Girdhari Lal Agarwala*, for the respondent.

IQBAL AHMAD and KENDALL, JJ. :—This is a second appeal by the plaintiff whose suit has been dismissed by both the lower courts. The circumstances are briefly as follows. One Jodha Singh was an occupancy tenant in a holding of which the plaintiff appellant is the sole zamindar. Jodha Singh died in 1919, leaving, it is alleged, no heir on whom the occupancy tenancy could legally devolve. Musammat Shiva Piari Kunwar, the widow of his brother, was admitted to the cultivation of the holding and recorded as a non-occupancy tenant with the permission of the appellant's agent. She instituted a suit for arrears of rent against the present defendant respondent, and her suit was decreed by the first court, but in appeal the two parties came to a compromise. The defendant thereafter made an application under section 42 of the Land Revenue Act to have his name recorded as the non-occupancy tenant of the holding. The application was opposed by Musammat Shiva Piari, and the plaintiff was a party to those proceedings. The decision of the revenue court was that the name of the defendant respondent should be recorded as non-occupancy tenant of the holding, with the remark that he was the adopted son of Jodha Singh. The plaintiff, therefore, filed the present suit in the civil court for a declaration that the defendant is not the adopted son of Jodha Singh, and the lower courts have dismissed his suit under section 167 of the Agra Tenancy Act of 1901. Reliance has been placed by both the courts below on the case of *Jagannath* v. *Balwant Singh* (1), a Letters Patent Appeal of this Court.

It will be seen that the relief claimed by the plaintiff in the plaint, namely, a declaration that the defendant is not the adopted son of Jodha Singh, is not a matter that could be finally decided in a revenue court. The real

(1) (1922) I.L.R., 44 All., 692.

contest, however, between the parties related to the occupancy tenancy. The plaintiff appellant's object, as shown in paragraph 7 of the plaint, was to dispossess the defendant of the holding. The circumstances in the case referred to are very similar to those in the present case. The plaintiff's suit there was that the defendant was a non-occupancy tenant and that the adoption of the defendant by the former occupancy tenant was illegal. The relief sought in the plaint was a declaration that the defendant was not the adopted son of the former occupancy tenant, but the object of the plaintiff was to prevent the defendant from establishing his claim to succeed to the occupancy holding, and it was decided that the *ratio decidendi* in all such cases must be what was the real contest between the parties, and what was the real object of the suit. It was found that the proper course for the plaintiff was to bring a suit for a declaration under section 95 of the Tenancy Act, and that in spite of the plea put forward by the plaintiff in regard to the adoption the civil court had in the circumstances no jurisdiction.

An attempt has been made on behalf of the appellant by Mr. *Bajpai* to distinguish the present case from the one referred to. He argues that the case put forward here by the plaintiff is not that the defendant is a non-occupancy tenant, but that he is a trespasser, and therefore no suit under section 95 of the Tenancy Act could lie in a revenue court. As a matter of fact it is nowhere clearly stated in the plaint that the defendant is a trespasser, and if the plea is accepted now, it will also be necessary to allow the plaintiff further to amend his plaint and to sue for possession in order to comply with the provisions of section 42 of the Specific Relief Act. Even if we shut our eyes to these difficulties, however, it appears to us to be clear that the question of whether the defendant is a trespasser or a tenant has been decided by the proceedings under section 42 of the Land Revenue

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Act. The plaintiff was a party to those proceedings, and he made no appeal against the decision that the defendant was a non-occupancy tenant. It was suggested that the decision of a revenue court in miscellaneous proceedings under section 42 would not prevent the plaintiff from establishing his claim in the civil court. The last sentence of section 44 read with section 32, however, makes it clear that this is not the case. The entries in the register referred to in clauses (*a*) to (*d*) of section 32 may be challenged in the civil courts. They relate to matters of proprietary title. The entries referred to in clause (*e*) of section 32 are expressly excluded from the last sentence of section 44. They relate to persons cultivating or otherwise occupying land as distinct from proprietors, under-proprietors, and revenue-free holders, and it appears, therefore, to be quite clear that the final decision in these cases would rest with the revenue courts, and will be binding on the parties to the proceedings. The decision in these proceedings that the defendant is a non-occupancy tenant is, therefore, binding on the plaintiff and it is fruitless to speculate what would be his position if it were open to him now to plead that the defendant is a trespasser and not a tenant. For these reasons we dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Sulaiman and Mr. Justice Banerji.

KISHAN LAL (PLAINTIFF) *v.* RAM LAL AND OTHERS (DEFENDANTS).*

1927
April, 29.

Act No. I of 1872 (*Indian Evidence Act*), *section* 92—*Evidence—Admissibility of evidence to show that two ostensible sales were in reality one transaction of exchange—Pre-emption.*

Held (1) that evidence is admissible to show that two documents which on the face of them were two separate sale-deeds were really intended to carry out one transaction, namely, an exchange, and (2) that, this being the case, no suit for pre-emption could lie. *Hanif-un-nissa* v. *Faiz-un-nissa* (1), referred to.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Munshi *Narain Prasad Asthana*, for the appellant.

Mr. *A. Sanyal*, for the respondents.

SULAIMAN and BANERJI, JJ. :—This is a plaintiff's appeal arising out of a suit for pre-emption. The suit was contested, *inter alia*, on the ground that the deed of sale was in reality a deed of exchange with regard to which no suit for pre-emption could lie. The court of first instance held that it was a sale and decreed the claim. On appeal the learned Judge has come to a contrary conclusion.

It appears that on the 5th of March, 1924, two documents were executed, both purporting to be sale-deeds, one by Ram Singh and Karna of the property in dispute in this case for a sum of Rs. 100 in favour of four sets of persons, and the other by these four sets of persons of a cattle-house for a sum of Rs. 100 in favour of Ram Singh

* Second Appeal No. 131 of 1926, from a decree of M. F. P. Herchenroder, Additional Judge of Agra, dated the 2nd of December, 1925, reversing a decree of Monindra Nath Baner i, Munsif of Fatehabad, dated the 17th of July, 1925.

(1) (1911) I.L.R., 33 All., 340.

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and Karna. These two documents were presented for registration on the same date and were registered simultaneously. The learned Judge has ignored the parol evidence led to show that the documents were not independent deeds of sale but represented one transaction. He has, however, relied on certain circumstantial evidence and then come to the conclusion that they formed one transaction, namely, that of an exchange. He has also found that although the price entered in the documents was Rs. 100, the fair price of the properties exchanged was only Rs. 25.

In our opinion extrinsic evidence was admissible for the purpose of showing that these two documents, though purporting to be separate sale-deeds, were in reality part and parcel of the same transaction, which was one of an exchange. We may refer to the case of *Hanif-un-nissa* v. *Faiz-un-nissa* (1), decided by their Lordships of the Privy Council. Such evidence which shows that two documents executed and registered on the same date are part and parcel of one transaction and in fact represent only one transaction, does not amount to leading evidence so as to vary the terms of a document. It was, therefore, open to the learned Judge to take into account such evidence. It, therefore, follows that his finding that the transactions were not two separate sale transactions but only one transaction of exchange must be accepted. The plaintiff has, therefore, no right to pre-empt the transfer.

The appeal is dismissed with costs.

Appeal dismissed.

(1) (1911) I.L.R., 33 All., 340.

Before Mr. Justice Sulaiman and Mr. Justice Banerji.

KUNDAN LAL (DEFENDANT) *v.* AMAR SINGH AND OTHERS (PLAINTIFFS).* 1927 *April*, 29.

Act (Local) No. XI of 1922 *(Agra Pre-emption Act), sections* 13 *and* 20*—Pre-emption—Successful suit by one of several rival pre-emptors no bar to suit by others for a share of the property pre-empted.*

Where there are several possible pre-emptors of equal degree, the fact that one has instituted a successful suit for pre-emption is no bar to the others—if they are within limitation—suing for a proportionate share in the property pre-empted. *Raj Narain Rai* v. *Dunia Pande* (1), followed.

THE facts of this case sufficiently appear from the judgement of the Court.

Dr. *N. C. Vaish*, for the appellant.

Munshi *Durga Prasad*, for the respondents.

SULAIMAN and BANERJI, JJ.—This is a defendant's appeal arising out of a suit brought by rival pre-emptors for a division of property with the contesting defendant. On the 9th of August, 1923, certain vendors sold the property to certain vendees. Kundan Lal the contesting defendant brought a suit for pre-emption against the vendees and obtained a decree on the 14th of March, 1924. He obtained possession under the said decree. The present plaintiffs, who are eight in number, brought the present suit on the 19th of July, 1924, for a share in the property so pre-empted. The defendant contested that inasmuch as he was a co-sharer and had acquired the property prior to the present suit, section 20 was a bar to the plaintiffs' claim. The court of first instance acceded to this contention and dismissed the suit, but the lower appellate court has come to a contrary conclusion.

*Second Appeal No. 2068 of 1925, from a decree of G. O. Allen, District Judge of Saharanpur, dated the 2nd of June, 1925, modifying a decree of Joti Sarup, Second Subordinate Judge of Saharanpur, dated the 9th of December, 1924.

(1) (1910) I.L.R., 32 All., 340.

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It cannot be doubted that before the passing of the Agra Pre-emption Act the mere fact that a rival pre-emptor had obtained a decree for pre-emption did not prevent other rival pre-emptors from claiming a share in the property as against him, provided their suit was instituted within one year from the sale. In the case of *Raj Narain Rai* v. *Dunia Pande* (1) it was pointed out that a right of pre-emption was not a right of re-purchase but a right of substitution for the original vendee, and that under the decrees in favour of the rival pre-emptors there has not been any fresh transfer in their favour but they have been put in the places of the original vendees.

In our opinion that law has in no way been altered by the new Act. Section 4, clause (9), embodies the principle that the right of pre-emption is not a right of transfer but a right of substitution. Under section 13, when two or more persons claiming pre-emption are equally entitled, the property shall be equally divided between them, each paying an equal share of the consideration for the transfer. It matters little who comes to court first, provided that they all come within the period of limitation. Section 20 of the Act cannot apply to the case where one rival pre-emptor has obtained a decree for pre-emption first. The expression " where the purchaser has *transferred* the property in dispute to a person having a right of pre-emption etc.," cannot cover the case of a pre-emptor obtaining a decree for pre-emption, for, as pointed out by us, that is not a case of a transfer by the vendee to the pre-emptor. In our opinion, therefore, the view taken by the learned District Judge was correct, and the present plaintiffs are entitled to their proportionate share in the pre-empted property.

Kundan was one of the claimants. The present plaintiffs, who are eight in number, are also claimants.

(1) (1910) I.L.R. 32 All., 340.

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These latter are, therefore, entitled to 8/9ths of the property sold under the deed of the 9th of August, 1923, on payment of 8/9ths of the sale consideration. The appeal is accordingly dismissed with costs.

Appeal dismissed.

Before Mr. Justice Iqbal Ahmad and Mr. Justice Kendall

SUBHAN ALI (DEFENDANT) *v.* CHITTU AND ANOTHER (PLAINTIFFS).*

1927

May, 2.

Act No. VIII of 1890 (*Guardians and Wards Act*), *section* 29—*Guardian and minor—Sanction of court to sale of minor's property—Condition subsequent imposed on guardian—Effect of guardian's failure to comply.*

A District Judge, while granting permission to a certified guardian of a minor to transfer the minor's property, can impose conditions on the guardian; but a distinction must be drawn between a condition precedent and a condition subsequent imposed on the guardian. The only duty cast upon the transferee by law is that he must satisfy himself that the order sanctioning the transfer has been strictly complied with by the guardian up to the time of the execution of the deed of transfer and that no conditions precedent imposed by the order have been violated. If by the order sanctioning the transfer, the guardian and not the transferee is directed to do certain acts after the execution of the deed of transfer, the failure of the guardian to comply with that direction cannot affect the validity of the transfer. *Dyam Khan* v. *Sarat Chandra De* (1) and *Kunja Mal* v. *Gauri Shanker* (2), referred to. *Sri Thakur Kishori Ramanji Maharaj* v. *Duley Ram* (3), distinguished.

THE facts of this case are fully stated in the judgement of the Court.

Munshi *Narain Prasad Ashthâna*, for the appellant.

Babu *Piari Lal Banerji*, for the respondents.

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*Second Appeal No. 533 of 1925, from a decree of A. G. P. Pullan, District Judge of Agra, dated the 16th of December, 1924, confirming a decree of Alakh Murari, Subordinate Judge of Agra, dated the 23rd of January, 1924.

(1) (1916) 26 C.W.N., 218. (2) (1905) 3 A.L.J., 30.
(3) (1924) 22 A.L.J., 155.

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SUBHAN ALI v. CHITTU.

IQBAL AHMAD and KENDALL, JJ. :—This is a defendant's appeal and arises out of a suit brought by two minor plaintiffs for a declaration that a sale-deed, dated the 25th of July, 1916, executed by their mother, Musammat Kelo, who was appointed their guardian by the District Judge, in favour of the defendant appellant, was null and void and was ineffectual to affect adversely their title to the house conveyed by that sale-deed. The plaintiffs alleged that there was no legal necessity for the transfer made by their mother, and that the sale by her was made without the permission of the District Judge and as such was voidable at their option. It was also alleged in the plaint that the sale-deed was not read over and explained to Musammat Kelo nor did she understand the nature of the transaction, and though this allegation of the plaintiffs was denied in the written statement, no issue was framed on the point by the trial court, and there is no discussion about this point in the judgements of the courts below and, as such, it is permissible to presume that the plaintiffs did not attack the validity of the sale-deed on this ground in either of the courts below.

The defence to the suit was that the sale-deed in dispute was executed by Musammat Kelo for valid necessity with the previous permission of the District Judge, and the plaintiffs were not entitled to avoid the same.

Both the courts below have held that the sale-deed must be taken to have been executed without the permission of the District Judge and is, therefore, voidable at the instance of the minor plaintiffs; but inasmuch as it was proved that a sum of Rs. 594 out of the sale consideration was taken for the benefit of the minors, the plaintiffs were entitled to a decree declaring the invalidity of the sale-deed subject to the payment of Rs. 594 to the defendant.

It is common ground that on the 8th of April, 1916, Musammat Kelo applied to the District Judge for permission to sell a house belonging to the plaintiffs in order to pay certain debts, and the District Judge, because of certain mistakes in the draft of the proposed sale-deed which was filed along with the application for permission to sell the house, rejected the application with liberty to the applicant (the plaintiffs' mother) to file a fresh application. On a second application being filed, the District Judge, on the 15th of July, 1916, granted permission to Musammat Kelo to sell the house for Rs. 925 and passed the following order :—" Permission is granted as prayed on condition that proof of payment of the decretal debt be filed." On the 25th of July, 1916, the house was sold to the defendant for Rs. 925, out of which Rs. 50 had been paid by the defendant to Musammat Kelo prior to the execution of the sale-deed and Rs. 875 were paid before the Sub-Registrar. Musammat Kelo paid the debts for the discharge of which the sale had been sanctioned by the District Judge, but did not file proof of the payment of the debts, as enjoined by the order, dated the 15th of July, 1916, and the District Judge, on the 5th of August, 1916, without issuing any notice either to Musammat Kelo or to the defendant appellant, revoked the sanction given by him on the 15th of July, 1916.

Thereafter, on the 1st of September, 1916, Musammat Kelo filed an application for cancellation of the order revoking the permission to sell the house given by the District Judge, and along with the application, filed receipts in proof of payment of debts, but the learned District Judge rejected the application on the 9th of September, 1916. It does not clearly appear whether or not the defendant appellant succeeded in getting possession of the house sold to him.

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The suit giving rise to the present appeal was filed about seven years after the execution of the sale-deed in favour of the defendant, *viz.*, on the 16th of July, 1923.

Both the courts below were of opinion that the permission granted to the guardian by the District Judge was a "conditional sanction" and the condition not having been complied with, the sale-deed was voidable at the instance of the minor plaintiffs. We are unable to agree with the view taken by the courts below.

It is true that a District Judge, while granting permission to a certified guardian of a minor to transfer the minor's property, can impose conditions on the guardian, but a distinction must be drawn between a condition precedent and a condition subsequent imposed by the District Judge on the guardian. Non-compliance with a condition precedent will vitiate a transfer made by the guardian. But the same cannot be the effect of non-compliance with a condition subsequent, unless there is something in the order, granting permission to transfer the minor's property, casting an obligation on the transferee of that property to do some act subsequent to the execution of the deed of transfer in his favour. The only duty cast upon the transferee by law is that he must satisfy himself that the order sanctioning the transfer has been strictly complied with by the guardian up to the time of the execution of the deed of transfer, and that no conditions precedent imposed by the order have been violated. If the conditions precedent have been complied with by the transferee in conformity with the permission granted by the District Judge, a good title will pass to the transferee, and the failure of the guardian to comply with the subsequent conditions cannot divest the title already vested in the transferee by the transfer. If by the order sanctioning the transfer, the guardian and not the transferee is directed to do certain acts after the execution of the deed of transfer, the failure of the guardian to comply with that

direction cannot affect the validity of the transfer. The view that we take is in consonance with the view taken in the case of *Dyam Khan* v. *Sarat Chandra De* (1) and with the view taken by RICHARDS, J., in the case of *Kunja Mal* v. *Gauri Shankar* (2). In the case last mentioned BANERJI, J., took a view opposed to the view taken by RICHARDS, J. But it appears that the transferee in that case had not complied with the permission granted by the District Judge directing him to pay the full consideration for the transfer and had retained a substantial portion of the consideration in his own hands. It does not appear from the judgement of BANERJI, J., whether he regarded the condition imposed by the District Judge in that particular case as a condition precedent or a condition subsequent to the execution of the sale-deed.

The courts below have also relied on the case of *Sri Thakur Kishori Ramanji Maharaj* v. *Duley Ram* (3). It was pointed out in that case that the decision in that case was confined to the facts of that particular case, and the learned Judges who decided that case refrained from "entering into the question whether in all cases revocation of the sanction will affect or not a transfer made previously to the revocation." Moreover, in that case a much larger property than was sanctioned to be sold by the District Judge was sold by the guardian. It appears to us that the view that we are taking is not in conflict with the view taken in the case of *Sri Thakur Kishori Ramanji Maharaj*. In the present case we are unable to hold that the condition that was imposed by the District Judge and was not complied with by the guardian was a condition precedent, and not a condition subsequent. The condition that the District Judge imposed was that proof of payment of the debts should be submitted to him. Obviously the debts could only be paid by the consideration for the sale-deed, and that consideration could only

(1) (1916) 26 C.W.N., 218. (2) (1910) 3 A.L.J., 30.
(3) (1924) 22 A.L.J., 155.

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come into the hands of the guardian by executing the sale-deed in favour of the defendant. It is clear, therefore, that proof of payment could not be submitted before the District Judge until the sale-deed had been completed. Therefore, in our judgement, the condition as regards the filing of proof of payment of the debts was a condition subsequent and the failure of the guardian to comply with that condition cannot affect the validity of the sale-deed in favour of the defendant appellant.

We may note in passing that, as a matter of fact, proof of payment of the debts was filed by Musammat Kelo along with the application that she made to the District Judge on the 1st of September, 1916.

For the reasons given above, we hold that the rights of the case were entirely with the defendant and not with the plaintiffs. Accordingly we allow the appeal, set aside the decrees of the courts below and dismiss the plaintiffs' suit with costs in all courts.

Appeal allowed.

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May, 2.

Before Mr. Justice Iqbal Ahmad and Mr. Justice Kendall.

SANOMAN SINGH AND OTHERS (OBJECTORS) *v.* RAJA RAM AND OTHERS (OPPOSITE PARTIES).*

Pre-emption—Decree conditioned on payment of purchase money within specified period of its becoming final—Meaning of "final."

Held that an appealable decree against which an appeal has not been filed becomes final on the expiry of the period of limitation prescribed for filing an appeal, and not from the day on which it was passed. *Hingan Khan* v. *Ganga Prasad* (1), and *Narain Das* v. *Lachman Singh* (2), dissented from. *Disa Singh* v. *Jaula Singh* (3), *Shaikh Ewaz* v. *Mokuna Bibi* (4), *Ram Sahai* v. *Gaya* (5), *Gopal Das* v. *Mamma Kunwar* (6) and *Fazal Husain* v. *Fazal-ud-din* (7), followed.

* Second Appeal No. 722 of 1925, from a decree of Radha Kishan, Subordinate Judge of Basti, dated the 15th of September, 1924, confirming a decree of Jagannath Singh, Munsif of Bansi, dated the 26th of April, 1924.

(1) (1876) I.L.R., 1 All., 293.
(2) (1880) I.L.R., 3 All., 135.
(3) Weekly Notes, 1881, p. 165.
(4) (1876) I.L.R., 1 All., 132.
(5) (1884) I.L.R., 7 All., 107.
(6) (1907) 5 A. L. J., 136.
(7) (1925) I.L.R., 47 All., 533.

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THE facts of this case are fully stated in the judgement of the Court.

Munshi *Harnandan Prasad*, for the appellants.

Babu *Piari Lal Banerji*, for the respondents.

IQBAL AHMAD and KENDALL, JJ :—The question that arises for consideration in the present appeal is whether an appealable decree against which an appeal has not been filed becomes final on the expiry of the period of limitation prescribed for filing an appeal from that decree, or does the decree become final on the very day on which it was passed? Both the courts below have held that a decree capable of being appealed against does not become final till the expiry of the period prescribed for filing an appeal against that decree.

The facts that led to the present appeal are as follows :—Ram Harakh Pande, the respondent, obtained a decree for pre-emption against the appellants on the 16th of March, 1921. The decree in favour of the respondent was conditional on the payment by him of the purchase-money within 30 days from the date of the decree becoming final. The appellants appealed against that decree and the first appellate court, on the 30th of June, 1921, dismissed the appeal. The purchase-money was deposited by the respondent more than 30 days after the 30th of June, 1921, viz. on the 1st of August, 1921. After depositing the purchase-money, the respondent applied for delivery of possession of the property pre-empted by him, and delivery of possession was made over to him on the 30th of June, 1922. On the 5th of November, 1923, the appellants filed an application for restitution under section 144 of the Code of Civil Procedure, and asserted that the decree of the trial court became final on the 30th of June, 1921,

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that is, on the date on which the first appellate court dismissed the appeal filed by the appellants. The respondent maintained that the decree of the trial court that was affirmed by the first appellate court did not become final till after the expiry of the period allowed for filing an appeal from the decree of the first appellate court, i.e. till after the expiry of 90 days from the 30th of June, 1921, and, therefore, the purchase-money had been deposited by him well within time.

In our judgement the view of law taken by the courts below is perfectly correct.

We are not unaware of the decisions in *Hingan Khan* v. *Ganga Prasad* (1) and *Narain Das* v. *Lachman Singh* (2), but with all respect we are unable to agree with those decisions.

It appears to us that an appealable decree can only become final when the time allowed for filing an appeal against that decree has expired without an appeal being filed. Till then the decree is capable of being challenged by an appeal, and, therefore, during that period it cannot be said that the decree has become final, or, in other words, has become unassailable. This was the view taken by this Court in the cases of *Disa Singh* v. *Jaula Singh* (3), *Shaikh Ewaz* v. *Mokuna Bibi* (4), *Ram Sahai* v. *Gaya* (5), *Gopal Das* v. *Mamma Kunwar* (6) and *Fazal Husain* v. *Fazal-ud-din* (7). We are in complete agreement with the view of law taken in the cases noted above and accordingly we dismiss the appeal with costs.

Appeal dismissed.

(1) (1876) I.L.R., 1 All., 293.
(2) (1880) I.L.R., 3 All., 135.
(3) Weekly Notes, 1881, p. 165.
(4) (1876) I.L.R., 1 All., 132.
(5) (1884) I.L.R., 7 All., 107.
(6) (1907) 5 A.L.J., 136.
(7) (1925) I.L.R., 47 All., 533.

REVISIONAL CRIMINAL.

Before Mr. Justice Boys.

EMPEROR *v.* TIRLOK AND OTHERS.* 1927 *May*, 4.

Criminal Procedure Code, sections 110 *and* 256—*Security for good behaviour—Accused not given an opportunity to cross-examine prosecution witnesses—Illegality.*

A magistrate conducting proceedings under section 110 of the Code of Criminal Procedure is bound to give the accused a reasonable opportunity of cross-examining the prosecution witnesses. If he refuses to do so, this is a good ground for setting aside the proceedings. *Chintamon Singh* v. *Emperor* (1) and *Ganga Singh* v. *King-Emperor* (2), referred to.

THE facts of this case are fully stated in the judgement of the Court.

Pandit *Narmadeshwar Prasad Upadhiya*, for the applicants.

The Assistant Government Advocate (Dr. *M. Wali-ullah*) for the Crown.

BOYS, J.—These two cases illustrate the unfortunate results that follow when Magistrates endeavour to rush through what threaten to be protracted proceedings, regardless of the provisions of the law. Some 16 accused persons, of whom the present applicants are 4, were under arrest in view of a contemplated gang case against them. The authorities, as they were perfectly entitled to do, decided to be content with proceedings under section 110. An order under section 112 was drawn up on the 15th of July, giving notice to the accused persons of proceedings that it was contemplated to take against them under section 110 of the Code of Criminal Procedure. Fifteen prosecution witnesses were forthwith examined. One of the present applicants,

* Criminal Revision No. 147 of 1927, from an order of Pratap Singh, Additional Sessions Judge of Gorakhpur, dated the 8th of November, 1926.

(1) (1907) I.L.R., 35 Calc., 243. (2) (1912) 10 A.L.J., 383.

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Dudhnath, was released on bail: the others remained in jail. The proceedings were held at Chaura. This was probably for the convenience of everybody, both prosecution and accused, but the result of holding proceedings at that place was naturally that there were no legal practitioners there, unless indeed they came for that particular case or some other case before the Magistrate. The accused, on the 15th, appear to have been wholly unrepresented. On the 16th and 17th, 27 more prosecution witnesses were examined. An application for bail was made by a mukhtar on behalf of Tirlok, one of the present applicants, and that was refused. There was some sort of attempt at cross-examination by one or two of the accused here and there, but, as might be expected, it consisted of only one or two questions occasionally put by one or other of the accused, and the great majority of the witnesses passed without a question being asked of them. This was what was to be expected. The accused were most unlikely to be able to conduct any efficient cross-examination themselves at all. So far there is nothing actually illegal. The 28th of July was fixed for the defence. But five days earlier, on the 23rd of July, an application was made through a mukhtar on behalf of Tirlok and Dudhnath to recall prosecution witnesses for cross-examination. This application was refused on the ground that one of the accused had been on bail since the 15th and had had an opportunity to appoint counsel and an application for bail had in fact been made by a mukhtar on behalf of one of the accused. The application for the recall of the prosecution witnesses was, therefore, refused. On the date fixed for the defence, the 28th of July, the application was repeated and was again refused. In the result the applicants before me have been called upon to furnish security under section 110, and have furnished that

security. Others of the accused persons are, I am informed, in jail upon failure to furnish security.

I am at the present moment concerned only with whether these men have had a legal trial. A subsidiary question would be whether any departure from procedure has been merely an irregularity or whether the accused have been prejudiced. The procedure that should have been followed is, in my opinion, perfectly clear. Section 117 requires that in the case of proceedings under section 110 they should be conducted "as nearly as may be practicable in the manner hereinafter prescribed for conducting trials and recording evidence in warrant cases, except that no charge need be framed." The reason for the exception is obvious. What is equivalent to a charge has already been framed in the order served upon the accused in accordance with section 112. According to section 254, at any stage of the prosecution case the Magistrate may frame a charge. According to section 255 the charge shall then be read and explained to the accused and he shall be asked whether he is guilty or has any defence to make. There is no reason why these two sections should not be applied to an inquiry under section 117, except in so far as the framing of a charge and the reading of it to the accused is concerned; in other words, at any stage of the prosecution the Magistrate, if he is *primâ facie* satisfied that there is a case against the accused, may interrupt the proceedings for the purpose of asking the accused whether he pleads guilty or whether he has any defence to make. If he decides to do that and the accused elects to defend, the Magistrate shall then ask the accused whether he wishes to cross-examine any of the prosecution witnesses and if he says he does so wish, he must be given an opportunity of cross-examining them. If, on the other hand, the

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Magistrate desires to hear all the prosecution witnesses before asking the accused whether he wishes to plead guilty or to defend himself, he is of course at liberty to do so. But when the stage is reached of asking the accused whether he wishes to plead guilty or to defend, the accused must be allowed an opportunity of cross-examining any witnesses whom he desires to cross-examine.

It is obvious on the face of it that this procedure may in some cases cause inconvenience and it may be much more convenient for the Magistrate to insist upon accused cross-examining immediately, whether they wish to do so or not and whether they are represented or not. But that is plainly not the law, and the accused were entitled to an opportunity of cross-examining in accordance with the law. The learned Sessions Judge remarks:—

> "Now coming to the trial, it would have no doubt been better had the learned Magistrate allowed a little time to the accused before proceeding to record the evidence against them;"

and later he says:—

> "Of course the appellants had no right to a second cross-examination under section 256 of the Code of Criminal Procedure and the objection taken is futile."

The fact of the matter is that in this case, apart altogether from the valid ground of objection based on section 256, there was in fact no reasonable opportunity given to the accused at any stage to cross-examine the witnesses. I emphasize the word "reasonable opportunity." Even had the Magistrate's proceeding been legal, which I do not think it was, I am still more confident that it was not reasonable. I cannot possibly hold otherwise than that the accused may reasonably claim to have been prejudiced by the way the proceedings were conducted. I may say

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that I have considered the cases of *Chintamon Singh* v. *Emperor* (1) and *Ganga Singh* v. *King-Emperor* (2).

I set aside the order of the learned Sessions Judge upholding the order of the Magistrate, and I set aside the order of the Magistrate calling upon the four applicants before me, Tirlok, Dudhnath, Lallu and Surjan, to furnish security, and direct him, if the district authorities still consider it desirable, to proceed with the case, giving these four persons the opportunity to cross-examine such of the prosecution witnesses whom they desire to cross-examine, after giving them reasonable notice. It is with reluctance that this Court must feel compelled to set aside proceedings at this stage, but no other course is possible if Magistrates will not follow the procedure provided and rush proceedings through against accused persons, and if in addition, upon an examination of the record, it is impossible to say that the accused cannot reasonably allege that they have been prejudiced.

Order set aside.

APPELLATE CIVIL.

Before Mr. Justice Sulaiman and Mr. Justice Banerji.

MUHAMMAD SA'ID KHAN (DEFENDANT) *v.* KUNWAR DARSHAN SINGH AND OTHERS (PLAINTIFFS).*

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May, 4.

Hindu law—Hindu widow—Transfer surrendering in favour of next reversioner, followed by sale-deed by the latter—Transaction amounting to sale by widow—Consent of next reversioner, effect of—Legal necessity—Presumption—Burden of proof.

A Hindu widow executed a deed of transfer of a portion of the property of her late husband, in favour of a person who at the time was the next presumptive reversioner, purporting to surrender all her interest in the property conveyed.

* First Appeal No. 339 of 1924, from a decree of Gauri Prasad, Subordinate Judge of Pilibhit, dated the 16th of May, 1924.

(1) (1907) I.L.R., 35 Ca'c., 243. (2) (1912) 10 A.L.J., 383.

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The next day the transferee sold the property, and both deeds were registered consecutively on that day. The transferee died before the widow, and on the widow's death the then reversioners sued the vendee for recovery of the property which he had purchased.

Held that, although it was evidenced by two separate deeds, the whole transaction was really one, and amounted to a transfer by the widow with the consent of the next reversioner, and this could not be upset unless the plaintiffs were prepared to lead evidence (which they were not) to show that there was in fact no legal necessity for the transfer or that the consent of the transferee reversioner had been obtained by fraud. *Rangasami Gounden* v. *Nachiappa Gounden* (1) and *Debi Prasad Chowdhry* v. *Golap Bhagat* (2), referred to.

THE facts of this case are fully stated in the judgement of the Court.

Dr. *Kailas Nath Katju*, for the appellant.

Pandit *Uma Shankar Bajpai*, for the respondents.

SULAIMAN and BANERJI, JJ:—This is a defendant's appeal, arising out of a suit for recovery of possession of a house, brought by the reversioners of Naik Rai Singh, who was the last male owner. He died some time in 1876, leaving two widows, one of whom died in 1890 and the other, Musammat Sundar Kunwar, died in 1917. In 1903 Hori Singh was the next reversioner, who would have succeeded to the estate if Musammat Sundar Kunwar had died then. On the 21st of September, 1903, she executed a deed of transfer in favour of Hori Singh, purporting to surrender all her interest in the house in dispute. On the 22nd of September, 1903, a sale-deed was executed by Hori Singh in favour of the defendant appellant, Haji Muhammad Sa'id Khan, and both these documents were presented for registration simultaneously between 1 and 2 o'clock on the 22nd of September, and both were registered consecutively.

(1) (1918) I.L.R., 42 Mad., 523. (2) (1913) I.L.R., 40 Calc., 721.

On the death of the widow the plaintiffs, claiming to be the next reversioners, brought this suit for recovery of possession. The pleas in the written statement, if examined strictly, amount to these, namely, that Musammat Sundar Kunwar had relinquished all her rights and interest in the property in favour of Hori Singh and had, therefore, extinguished her widow's estate, with the result that Hori Singh became the permanent owner, and that, as such, he was perfectly competent to transfer the property. Paragraph 4 was curiously worded and it raised the plea that the transfer by Musammat Sundar Kunwar and the sale by Hori Singh to the defendant amounted to an alienation for consideration by the widow with the consent of the reversioner. When the time for the framing of the issues came, the parties understood what was meant by the plea in paragraph 4, and issue No. 3 which was framed was in the following words :—

"Is the sale made by Hori Singh in favour of the defendant to be looked upon as a transfer for consideration with the consent of the next reversioner on behalf of the widow herself? If so, how does that affect the case?"

The plaintiffs apparently led no evidence at all. On behalf of the defendant only the defendant himself was examined as a witness. This is the entire evidence, apart from certain documents which were filed by either party. The learned Subordinate Judge has come to the conclusion that there could be no surrender of the estate to the next reversioner, inasmuch as it was a gift of a part of the estate only.

In our opinion it is not fair to the defendant to pin him down to the strict wording of the written statement, which must have been drafted by his legal adviser. The issue before the parties was clear, and we think that there is no doubt that the defendant did mean to put forward the case that the two transactions

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were really part and parcel of one transaction, which was a sale by the widow with the consent of the next reversioner. The defence, therefore, cannot be struck out on the ground that it was not raised in the written statement.

The main question of fact which we have to consider is whether the defendant has succeeded in proving that the two documents, which on their face value appear to be in fact two separate transactions, were really part and parcel of one transaction of a sale by the widow. The defendant is in this unfortunate position that the scribe of the two documents, Janki Prasad, as well as Hori Singh and the attesting witnesses, Nathu Khan, Kifayat-ullah Khan and Mohan Lal, are all dead. Thus, the persons, who on the face of these documents had any connexion with these transactions, are all dead except the vendee Muhammad Sa'id Khan. We have thus the solitary evidence of Muhammad Sa'id Khan as to what actually happened. Muhammad Sa'id Khan's statement is that one Kifayat-ullah came to him, professing to come on behalf of Musammat Sundar Kunwar, and informed him that there was property for sale by the widow and that he should purchase it. Muhammad Sa'id Khan said that a widow had no power to sell any property absolutely. To this Kifayat-ullah replied that she was prepared to sell the property and that the next reversioner, namely, Hori Singh was ready to join in the sale-deed. Muhammad Sa'id Khan then consulted Hafiz Muhammad Ismail, pleader, who advised him that the effective way was to obtain a *tamliknama* from the widow in favour of Hori Singh, and a sale-deed from Hori Singh. Muhammad Sa'id Khan's evidence is that on receiving this legal advice he got two drafts, namely, one of a *tamliknama* and the other of a sale-deed,

prepared and gave them to Kifayat-ullah. Then Kifayat-ullah came four or five days afterwards and told him that both Musammat Sundar Kunwar and Hori Singh had accepted the drafts and were ready to execute the documents. On this Muhammad Sa'id Khan deputed his *karinda*, Nathu Khan, to get the documents executed and gave him Rs. 2,500 the sale consideration. Muhammad Sa'id Khan then states that his *karinda* Nathu Khan got the two documents duly executed and registered. The vendee frankly confessed that he made no inquiry as to whether there was any relation nearer than Hori Singh, or whether there was any necessity for the widow to sell the property.

The question remains whether this evidence, coupled with the coincidence of the dates of registration of the two documents, and the fact that the same set of attesting witnesses attested both the deeds and the same scribe faired out the documents, proves the defendant's case that it was really one transaction of sale. No doubt the mere statement of Kifayat-ullah that he had been sent by Musammat Sundar Kunwar is no evidence, by itself, of the fact that he had been sent by her, but in this particular case we find that the idea of having two documents instead of one emanated from the legal adviser of the defendant and that the two drafts were handed over to Kifayat-ullah which were subsequently faired out and the two deeds were duly signed by Musammat Sundar Kunwar and Hori Singh under the supervision of his *karinda* Nathu Khan. This shows definitely that Kifayat-ullah must have communicated the reply of the defendant to the lady who accepted the drafts and ultimately signed the fair copy. We may also note that, according to one power of attorney, Hori Singh was one of the general attorneys of Musammat Sundar

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Kunwar and was on good terms with her. The plaintiffs have admitted the genuineness of the transfer by the lady and there is no ground for suspecting that any fraud was practised on her. We may point out that the learned Subordinate Judge has not directed his attention clearly to this question whether the two deeds evidenced one or two independent transactions. On the evidence of Muhammad Sa'id Khan and the surrounding circumstances of the case, we are of opinion that they were really drafted separately on the advice of the defendant's pleader, and that the real transaction was a sale by the widow.

The next question is whether the defendant has succeeded in showing that this transfer is binding on the reversioners. Had Hori Singh survived the widow and the succession opened out to him, there would have been no difficulty and he would undoubtedly have been estopped. It is, however, admitted that he predeceased the widow. The plaintiffs, therefore, are not absolutely bound by any admission or consent of Hori Singh. At the same time it is not denied on their behalf that Hori Singh was the next immediate reversioner. In fact, on the pedigree given by the plaintiffs themselves he was much nearer in degree to Rai Singh than the present plaintiffs are. Having found that the two deeds evidenced one transaction, we can have no doubt in our minds that Hori Singh was a consenting party to this transfer. The consent of a reversioner is no conclusive proof of the existence of legal necessity. It raises a presumption of the existence of such necessity. The law on this point has been laid down by their Lordships of the Privy Council in the case of *Rangasami Gounden* v. *Nachiappa Gounden* (1). After discussing the various authorities their Lordships summarised the law at

(1) (1918) I.L.R., 42 Mad., 523.

page 536 in the form of two propositions, the second of which is :—

"When the alienation of the whole or part of an estate is to be supported on the ground of necessity, then, if such necessity is not proved *aliunde*, and the alienee does not prove anywhere on his part an honest belief in the necessity, the consent of such reversioners as might fairly be expected to be interested to quarrel with the transaction will be held to afford presumptive proof which, if not rebutted by contrary proof, will validate the transaction as a right and proper one."

Their Lordships quoted with approval a similar proposition laid down in the Full Bench case of *Debi Prosad Chowdhry* v. *Golap Bhagat* (1), where it was remarked that—

"alienation by way of mortgage by a Hindu widow as heiress of a portion of the estate of her deceased husband, without proof either of legal necessity or of reasonable inquiry and honest belief as to its existence, but with the consent of the next reversioner for the time being, will be valid and binding on the actual reversioner, if the presumption of legal necessity or a reasonable inquiry and honest belief raised by such consent is not rebutted by more cogent proof."

In view of this statement of the law it follows that the defendant, even though he did not prove the actual existence of any legal necessity or any *bonâ fide* inquiry as to the necessity by him, or even an honest belief on his part that such necessity existed, has nevertheless discharged that burden, in the first instance, by proving consent of Hori Singh, and that the transaction would be binding on the reversioners until they led cogent evidence to the contrary.

In this particular case the plaintiffs have led no evidence to show that there was no legal necessity or that the consent of Hori Singh was obtained by fraud. In the absence of such evidence, we are of opinion that the presumption raised by the consent of Hori Singh has not been rebutted.

(1) (1913) I.L.R., 40 Calc., 721.

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We accordingly allow this appeal and setting aside the decree of the court below dismiss the plaintiffs' suit, but we direct that the parties should bear their own costs in both the courts.

Appeal allowed.

Before Justice Sir Cecil Walsh and Mr. Justice Ashworth.

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May, 4.

PIARI LAL AND OTHERS (DEFENDANTS) v. MINA MAL, BALKISHAN DAS (PLAINTIFF).*

Act No. IX of 1872 (*Indian Contract Act*), *sections* 73, 77, 87 *and* 88—*Sale—Earnest-money—Failure of seller to make delivery—Right to recovery of earnest-money.*

Although there is no specific provision in the Indian Contract Act relating to the refund of money paid as earnest-money or part payment, where such a payment is made on a contract for the sale of goods to be delivered at a later date and the seller does not make delivery, the buyer is entitled to recover the money so paid.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Babu *Piari Lal Banerji*, for the appellants.

Dr. *Kailas Nath Katju*, for the respondent.

WALSH, J.—I am of opinion that this decision is right, though I find myself unable to agree with the reasoning by which it has been arrived at. The facts, so far as they are known, are perfectly simple. In 1922 the defendants sold a large quantity of grain to the plaintiff, and the plaintiff paid a substantial sum as earnest-money. No date was specified for delivery. The goods were to be delivered at a later date, presumably on demand. The plaintiff assigned his rights under the contract. It looks very much as if the transaction was a gambling transaction, but the parties have not said so. He then foolishly and ignorantly

* First Appeal No. 144 of 1926, from an order of Aghornath Mukerji, District Judge of Meerut, dated the 31st of May, 1926.

brought a suit for non-delivery, or in other words, for breach of the contract which he had assigned in 1925. That would have been right if he had joined the assignee as plaintiff or, if the assignee had refused, as defendant, but having assigned the contract and having sued without the assignee, his claim for non-delivery was defeated by a technical objection. One must assume from that that the goods had not been delivered in 1925. It is fairly obvious that they have not been delivered now, and that any claim for non-delivery is barred by the statute of limitation. One view of the case, however, may be that the parties by their conduct have made a mutual rescission of the contract, though I doubt whether that is a sound view to take. But it cannot be denied that the contract is now at an end, and that the vendor has in his pocket money belonging to the plaintiff, paid as part performance of a contract which has been terminated, and that it is against conscience for him to retain it. The English law on this matter is quite clear. Benjamin on Sales says :—

> "A buyer who has paid money under a contract of sale may recover it back when the consideration on which it was paid has failed, for in that event it is unconscientious for the seller to retain it without consideration, and the money is in consequence, in the eye of the law, received by the seller to the use of the buyer."

This principle, which is ancient and elementary, is recognized in the English Sale of Goods Act by section 54, which runs as follows :—

> "Nothing in this Act shall affect the right of the buyer or the seller to recover money paid, where the consideration for the payment of it has failed."

One would have expected to find a corresponding provision in the Indian Contract Act. At somewhat short notice I have searched for something corresponding to it and have failed to find it. I, therefore, hold

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that there being no express provision upon the question mooted, in India, we are bound by the law of equity and good conscience as laid down in the Bengal Regulations. That has always been held to be capable of interpretation in accordance with the common law of England. I decline to believe that in India if you pay a man a sum in advance for the performance of a contract at a future date which becomes impossible, so that there is a total failure of consideration, he is entitled to keep your money in his pocket. It is against all law and conscience, and I therefore hold, being unable to find anything to the contrary in the express provisions of the statute law, that this money was money belonging to the plaintiff and that he is entitled to recover it in this suit. I might add that in my view the only defence to this suit was for the defendant to plead and prove that he had delivered the goods under the contract to the plaintiff's assignee. This he has failed to do, and there is, therefore, no defence. The appeal must be dismissed with costs.

ASHWORTH, J.—This was a case where the defendant had made a contract, for sale of certain wheat to be delivered at a future date, with the plaintiff. The plaintiff made a contract with a third person for delivery to that third person of a like quantity of wheat at the future date. This in effect was what the second contract amounted to, although it appears to have been framed in the form of a transfer by the plaintiff to the third party of the benefit of the plaintiff's contract with the defendant. The defendant apparently failed to deliver the wheat to the plaintiff. The plaintiff was, therefore, unable to fulfil his contract with the third party. The plaintiff has sued the defendant for the return of what is called earnest-money but in effect was a payment in advance for the wheat that was subsequently

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to be delivered. In bringing this suit it looks as if the plaintiff considered that the third party with whom he made the contract for delivery of a like quantity of wheat would be entitled to bring a suit against the defendant for failure of the defendant to supply the wheat. If this is so, I think the plaintiff is in error. The Indian Contract Act makes no special provision for the recovery of earnest-money. The remedy is merely one for loss or damage caused to a person by another person who has broken a contract; see section 73 of the Contract Act. This benefit under section 73 is, therefore, merely a right to sue and cannot be transferred. As the lower appellate court has pointed out, the payment of an earnest-money does not in itself create a right to recover the same. It merely gives the person paying the earnest-money a chance of recovering the same as damages. In this view of the case the lower appellate court was right in holding that the right to sue the defendant for damages could not be and was not transferred by the plaintiff to the third party. Having regard to sections 73, 77, 87 and 88 of the Contract Act, I consider that there was never any privity of contract or of property effected between the defendant and the third party. This being so, it is clear that the defendant could not plead that he was liable to pay the earnest-money to the third party and not to the plaintiff. For the above reasons I concur in the finding and would dismiss the appeal with costs.

Ashworth, J.

Appeal dismissed.

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May, 5.

Before Justice Sir Cecil Walsh and Mr. Justice Ashworth.

MASHAL SINGH (DEFENDANT) *v.* AHMAD HUSAIN (PLAINTIFF) AND ZAFAR HUSAIN KHAN AND ANOTHER (DEFENDANTS).*

Muhammadan law—Dower—Widow's lien—Act No. 1 of 1877 *(Specific Relief Act), section* 9*—Remedy of widow if dispossessed.*

The lien of a Muhammadan widow over property, on account of dower debt, only operates so long as she remains in possession of the property. On being deprived of possession, she has a right, independently of her lien, to recover possession within six months under the Specific Relief Act. The lien gives her no title, or right to recover possession, but only a right to retain possession. *Ali Bakhsh* v. *Allahdad Khan* (1), approved. *Azizullah Khan v. Ahmad Ali Khan* (2), referred to.

THE facts of this case were as follows :—

The plaintiff sued as transferee of certain property from one Abadi Begam. His case was that the property belonged to one Haidar Khan and was retained by his widow Musammat Khatun Begam by right of lien for her dower debt of Rs. 60,000; that on the death of the widow Musammat Khatun Begam, one Zafar Hasan Khan, a son of Haidar Khan by another wife, took forcible possession of the property, although Musammat Abadi Begam, sister of the widow, was entitled to it and that Musammat Abadi Begam sold the plaintiff her interest. The plaintiff was undoubtedly entitled to the one-eighth of the property which the widow inherited from her husband, irrespective of any right of lien for her dower debt. That one-eighth passed to Musammat Abadi Begam, sister of the widow, and was transferred by her to the plaintiff. The first court held that, as Abadi Begam and her transferee, the plaintiff, were out of possession, the plaintiff could not, on the strength of the lien, sue for possession. The lower appellate court

* Second Appeal No. 1299 of 1924, from a decree of Tufail Ahmad, Subordinate Judge of Shahjahanpur, dated the 29th of May, 1924, reversing a decree of Ansuiya Prasad Ghildial, Munsif of Shahjahanpur, dated the 30th of June, 1923.

(1) (1910) I.L.R., 32 All., 551. (2) (1885) I.L.R., 7 All., 353.

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held that a Muhammadan widow or her legal representative, by reason of a lien, occupied a position analogous to that of a mortgagee in possession, and if that possession was disturbed, could sue to recover it on the basis of the lien. The court relied upon the decision in *Azizullah Khan* v. *Ahmad Ali Khan* (1). The defendant appealed.

Munshi *Narain Prasad Ashthana*, for the appellant.

Hafiz *Mushtaq Ahmad*, for the respondents.

WALSH, J. :—In our opinion this appeal must be allowed. In most respects we agree with the very clear judgement of the lower court, but there is one respect in which we find ourselves unable to agree with the Judge. In discussing the right of the widow to remain in possession till her dower debt has been satisfied and the right of her heirs, who are entitled to succeed her, to exercise and enforce the same right, the learned Judge makes this *addendum* : "and if wrongfully deprived thereof, to maintain a suit for its recovery." That is true, but not in the sense in which the learned Judge used that phrase. The right to maintain a suit for recovery of possession, if wrongly deprived thereof, has nothing to do with the right of lien. It is the ordinary right under the Specific Relief Act of a person rightfully in possession to sue on a possessory title for recovery of possession if he has been wrongfully deprived of it, but such a suit must be brought within six months of the wrongful dispossession. That is not this case, nor can such a claim in a suit be justified by a claim to assert a lien. We do not propose to add to the complications, which are already sufficient, in the Law Reports, by discussing the various rights which arise in connection with what is called a dower debt. We are content to adopt the very clear and learned judgement of Mr. Justice TUDBALL in the case of *Ali Bakhsh* v. *Allahdad Khan* (2). But a

(1) (1885) I.L.R., 7 All., 353. (2) (1910) I.L.R., 32 All., 551.

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lien is not a right to possession, and although the right of lien may be analogous to the right of a mortgage, the comparison gives no assistance unless you define the mortgage to which the right of lien is analogous, and arrive at an agreement as to the essentials of a lien which are coterminous with the essentials of a particular form of mortgage. The mortgagee's right to possession is based upon the contract, but the right to a lien is based upon possession. It does not give a right to recover possession if it should be lost. The result is that we have to allow this appeal so far as the claim to the lien is concerned. It is admitted that the possession in this case was lost by the wrongful act of defendant No. 1. On the other hand, it has never been disputed, and inasmuch as the lower appellate court decided in favour of the plaintiff the question did not arise, that the plaintiff is entitled to a one-eighth share by way of inheritance. The claim for possession based upon lien, which was the substantial matter in the suit, must be dismissed, and the plaintiff must pay the costs of the suit in the court below and in this Court. She is entitled from us to a declaration that she is the owner, by virtue of inheritance from her deceased husband, of a one-eighth share in the property

ASHWORTH, J., (after reciting the facts) :—I concur with my learned brother that the lien of a Muhammadan widow over property, on account of a dower debt, only operates so long as she remains in possession of the property. On being deprived of possession, she has a right, independently of her lien, to recover possession within six months under the Specific Relief Act. The lien gives her no title, or right to recover possession, but only a right to retain possession.

Nor, apart from section 9 of the Specific Relief Act, can the widow rely on the title arising from mere prior possession. Title based on mere prior possession

is only available against someone other than the rightful owner. The heir is the rightful owner and the widow, only having a right of lien, has no title.

The decision of the lower appellate court invoked the authority of many cases by this Court and their Lordships of the Privy Council for holding that— *Ashworth, J.*

> "a Muhammadan widow occupies a position analogous to that of a mortgagee, whose possession cannot be disturbed until the dower debt has been satisfied."

It went on to hold that the heirs of a widow had a like right to retain possession of the property. So far I concur with the decision. But, when it would allow a widow or her heirs to bring a suit for possession on the basis of the lien, it quotes no authority and I concur with my learned brother that the decision should not be followed.

In the present case it would appear that the remedy under the Specific Relief Act is no longer available to the plaintiff and, indeed, that any right to claim the dower debt has become barred by limitation. I, therefore, concur in the order proposed by my learned brother.

Appeal allowed.

Before Justice Sir Cecil Walsh and Mr. Justice Ashworth.

RAM SURAT SINGH AND OTHERS (PLAINTIFFS) *v.* BADRI NARAIN SINGH AND ANOTHER (DEFENDANTS).*

1927 *May*, 5.

Act No. IX of 1908 (*Indian Limitation Act*) *schedule I, articles* 142 *and* 144—*Suit for possession of immovable property —Limitation—Adverse possession—Burden of proof.*

If a suit is for possession by a plaintiff who says that while he was in possession of the property he was dispossessed or has gone out of possession, then he must show possession within twelve years of the suit. But every other case in which a plaintiff claims possession of immovable property

* Second Appeal No. 1749 of 1924, from a decree of Baij Nath Das, District Judge of Azamgarh, dated the 29th of August, 1924, confirming a decree of Ram Ugrah Lal, Subordinate Judge of Azamgarh, dated the 9th of May, 1923.

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must be a case under article 144 of the Limitation Act, unless otherwise specially provided, and in such a case limitation only begins to run where the defendant's possession becomes adverse. In such cases the onus lies on the defendant to plead and prove that his possession became adverse and continued adverse for more than twelve years before the suit. *Jai Chand Bahadur* v. *Girwar Singh* (1), and *Secretary of State for India in Council* v. *Chellikani Rama Rao* (2), followed.

This was a second appeal arising out of a suit brought by the plaintiffs in respect of certain property. The defendant No. 1 was the father of the plaintiffs. The defendant No. 2 was the widow of their father's first cousin Ranjit Singh. The plaint set forth that Ranjit Singh was joint with Badri, father of the plaintiffs, that on the death of Ranjit Singh the property came to their father Badri by survivorship, but that the name of the widow, i.e. defendant No. 2, was recorded in the village papers by way of consolation, though she was never in possession of the property. It went on to state that the plaintiffs' father brought a suit against the widow in respect of the property and was unsuccessful. It did not say whether that suit was one for possession or merely for declaration. It went on to say that the plaintiffs were not in any way bound by the finding in that suit against their father as he was not representing them, but, notwithstanding this fact, the defendant No. 2 had been obstructing the plaintiffs in their possession of the property. The natural relief to be asked on these facts would be one for a declaration, but the plaintiffs not only asked for an injunction against the widow but they asked to recover possession of the property from her. Both the lower courts treated the suit as one for possession of the property and dismissed it as being barred by limitation, on the ground that the widow had been in possession for more than twelve years

(1) (1919) I.L.R., 41 All., 669. (2) (1916) I.L.R., 39 Mad., 617.

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and that the plaintiffs should have sued within twelve years of the death of Ranjit Singh. The plaintiffs appealed.

Mr. *T. N. Chadha*, for the appellants.

Maulvi *Mukhtar Ahmad*, for the respondents.

WALSH, J. :—To my mind this is a clear case and has been misconstrued in the courts below owing to two fallacies against which I have frequently protested. I think the courts have misunderstood it probably because they did not actually study articles 142 and 144 of the Limitation Act, which deal with totally distinct matters which, unfortunately, are constantly confused, even by decisions in the High Court. Secondly, the lower appellate court committed the fault of deciding the limitation issue only, instead of disposing of all the issues so that the court of appeal could give a final decision if it was wrong. Now the case will have to go back. It is a difficult task to decide in every case what cause of action the plaintiff intended to set up when the controversy is about an article in the Limitation Act, partly because pleading is not scientific and also because, I am afraid, pleaders have by bitter experience got into the habit of claiming possession when really the relief which they claim is declaratory, because they have seen so many cases of declaratory relief dismissed under the Specific Relief Act. But, reading between the lines, the plaintiff claims title. You cannot call it an ejectment suit, because the plaintiff alleged in paragraph 5 that the defendant No. 2 was never in possession. What he probably meant to say was that in some way or another the defendant had threatened the plaintiff's possession, or had cast some cloud or threat upon the plaintiff's title, and, on the face of it, it is odd and inconsistent to claim recovery of possession from a person, and at the same time to say he was never in possession, and a suit for possession

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Walsh, J.

against a person who has never been in possession must fail. But defendant No. 2 cured any defect which there was in the plaint. Two negatives do not make an affirmative, but two defective pleadings sometimes make an intelligible cause of action, and it is quite obvious that the real issue was that the defendant claimed to have been in adverse possession. By paragraph 3 she pleaded that since the death of Ranjit Singh she alone had been in proprietary possession, and issue No. 3 was framed on that plea. Now I have exhausted myself in trying to explain the conflicting cases, and to make clear the difference between articles 142 and 144, in a judgement by a Bench to which I was a party in the case of *Jai Chand Bahadur* v. *Girwar Singh* (1), in which I endeavoured to explain and enforce the decision of the Privy Council in the case of *Secretary of State for India in Council* v. *Chellikani Rama Rao* (2), which I regard as a direction to the High Courts in India, and as having overruled several decisions in this and other High Courts. If the suit is for possession by a plaintiff who says that while he was in possession of the property he was dispossessed or has gone out of possession, then he must show possession within twelve years, because the suit must be brought within twelve years of the date of the dispossession, and nobody can be dispossessed who is not already in possession, nor can you retain possession unless you are in possession. But every other case in which a plaintiff claims possession of immovable property, must be a case under article 144, because it is a case not otherwise specifically provided, and in such a case limitation only begins to run when the defendant's possession becomes adverse. The result of that is that the onus lies on the defendant to plead and prove that his possession became adverse and continued adverse for more than twelve years before the suit. In this case the

(1) (1919) I.L.R., 41 All., 669. (2) (1916) I.L.R., 39 Mad., 617.

defendant alleged it. She has failed to prove it in this sense that both the courts have got off the rails and have found not in favour of the defendant, which was the only way in which the defence could succeed, but against the plaintiff. The first court says that the suit ought to have been brought within twelve years of the date of the death of Ranjit Singh. That is quite irrelevant. It had to find that the defendant had been in adverse possession continuously since the death of Ranjit Singh, in order to entitle the defendant to succeed on this issue. The lower appellate court has done practically the same thing. In a judgement, which I can only describe as vague, it finally comes to the conclusion that the plaintiff's right of possession arose on the death of Ranjit Singh. It may have done so, but before the defendant could succeed on this plea she had to obtain a finding that she had been in adverse possession. I suspect that the findings favourable to the defendant in both the courts on this misdirection were obtained by citing to the learned Judge the old authorities under section 142, which do not apply, and that probably those who argued the case are just as much responsible as those who have decided it, but the defendant having pleaded it, an issue having been framed upon it, both courts having decided it, and the defendant having failed to obtain from either court a finding that her possession had been continuous and adverse for more than twelve years, the matter has been decided unfavourably to the defendant and is no longer, to my mind, a relevant issue in the suit and ought to be treated as decided in favour of the plaintiff. The rest of the case must go down for the disposal of the remaining issues.

Walsh, J.

We, therefore, allow the appeal, set aside the decree of the court below, and remand the case under order XLI, rule 23, to be disposed of according to law.

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ASHWORTH, J., (after reciting the facts) :—

The trial court framed an issue as to whether Ranjit Singh was joint or separate from Badri, the father of the plaintiffs, and held that he was separate. This finding was against the plaintiffs. Again the trial court held that the father had represented the plaintiffs in the suit against the defendant No. 2, and so the claim was barred by the rule of *res judicata*. Lastly, it held that the widow, defendant No. 2, had been in adverse possession of the property for more than twelve years. Now this last finding was inconsistent with the finding that Ranjit Singh was separate from Badri. If he was separate then the widow would be in possession as a widow and could not be in possession adversely.

The lower appellate court only dealt with the question of limitation. It affirmed the decision of the trial court that the widow had been in adverse possession for more than twelve years at the date of suit. The same objection exists to this finding as was mentioned above. If Ranjit Singh was separate from Badri, there could be no question of adverse possession.

I would, therefore, remand the case to the lower appellate court. The lower appellate court should consider the finding of the trial court as to Ranjit Singh being joint with Badri or otherwise. If it finds that he was separate from Badri, as was found by the trial court, then no question of adverse possession arises. The widow is entitled as a widow to maintain possession of the property and the suit must fail as the plaintiffs do not sue for a declaration, as reversioners against the transferees, that the alienation to them is only good for her life-time. If, however, it finds that the family was joint, it will be necessary for the lower appellate court to decide whether the widow has acquired a right to the property by twelve years' adverse possession. In

coming to a decision on this point the court should remember, as pointed out by my learned brother, that the burden of proof is on the widow and not on the plaintiffs. Thirdly, the lower appellate court will have to decide whether the trial court was right in holding that the suit between the father and the widow was by the father as representing the plaintiffs. If it agrees with the decision of the trial court then this suit will clearly be barred by operation of *res judicata*.

BY THE COURT.—The order of the Court is that the appeal is remanded to the lower appellate court for rehearing of the appeal in accordance with the instructions given above. Costs of the case will abide the result.

Appeal allowed and case remanded.

Before Justice Sir Cecil Walsh and Mr. Justice Iqbal Ahmad.

KUNDAN LAL (PLAINTIFF) *v.* BISHESHAR DAYAL AND OTHERS (DEFENDANTS).*

1927
May, 6.

Act No. IX of 1908 (*Indian Limitation Act*) *schedule I, articles* 62 *and* 97—*Sale—Price paid but property not delivered—Suit for return of price—Limitation.*

Where a purchaser pays the price of property which he has bought, but fails to obtain possession from the vendor, he has a right to sue for the return of the purchase-money, which commences from the date when delivery is asked for and refused. The suit is governed, as regards limitation, by either article 97 or article 62 of the first schedule to the Indian Limitation Act, 1908. *Mul Kunwar* v. *Chattar Singh* (1) and *Arunachala* v. *Ramasami* (2), referred to. *Janak Singh* v. *Walidad Khan* (3) and *Hanuman Kamat* v. *Hanuman Mandur* (4), followed.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

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* Second Appeal No. 770 of 1925, from a decree of Gopal Das Mukerji, District Judge of Mainpuri, dated the 13th of January, 1925, confirming a decree of Ganga Prasad Verma, Officiating Subordinate Judge of Mainpuri, dated the 23rd of July, 1923.

(1) (1908) I.L.R., 30 All., 402.
(2) (1914) I.L.R., 38 Mad., 1171.
(3) (1915) 13 A.L.J., 669.
(4) (1892) I.L.R., 19 Calc., 123.

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KUNDAN LAL v. BISHESHAR DAYAL.

Dr. *N. C. Vaish*, for the appellant.

Munshi *Narain Prasad Ashthana*, for the respondents.

WALSH and IQBAL AHMAD, JJ. :—This is an interesting point upon which at one time or another there appears to have been a difference of opinion. The plaintiff has suffered the double misfortune of purchasing property of which he has not received delivery from the vendor, and also of paying the price. The defendant has failed to make a title. The suggestion is that he had already sold to somebody else, although that issue has not been actually determined, because the case has been disposed of on the legal question. It seems more likely that it was a piece of dishonesty on the part of the vendor than a mere act of forgetfulness, but that does not alter the law. One result is that the plaintiff has paid the purchase-price for a consideration, namely, the transfer of the property, which has failed. That is article 97. Another view of the matter is that he has paid money to the defendant for nothing, which the defendant has no right to retain against the demand of the plaintiff, as was said by the old lawyers, against equity and right. That is money received for the use of the plaintiff, which is article 62. It may be also treated, and good reasons could be given for doing so, as either a breach of a contract in writing, or the breach of an implied covenant under section 55 (2) of the Transfer of Property Act, and varying views have been taken on these alternative possibilities.

There is one decision relied upon by the plaintiff in *Mul Kunwar* v. *Chattar Singh* (1) and there is another case relied upon by him in *Arunachala* v. *Ramasami* (2). Both of these decisions treat article 116 as applicable and come within six years, although *Arunachala* v. *Ramasami* (2) can really be distinguished from the present case.

(1) (1908) I.L.R., 30 All., 402. (2) (1914) I.L.R., 38 Mad., 1171.

On the other hand, there is a more recent decision of this Court, namely, *Janak Singh* v. *Walidad Khan* (1), decided by Mr. Justice CHAMIER and Mr. Justice PIGGOTT in 1915, which holds in a similar case that articles 62 and 97 are the appropriate ones. If there were nothing else, we should be prepared to follow this decision on the ground of the desirability of maintaining a consistent and concurrent authority on a question like this and also because the courts below have rightly held themselves bound by this decision—they had absolutely no alternative—and, therefore, their decision was right until it reached this Court at any rate; but the decision of the Privy Council in *Hanuman Kamat* v. *Hanuman Mandur* (2) appears to us to be so much in point that even if we were disposed to depart from the last decision of this Court, we ought not to do so, but are bound to follow the view taken by the Privy Council. In that case a sale of joint family property went off upon objection made by other co-sharers of the vendor, but the purchase-money was paid before it went off. Like this case, the vendor was unable to give title and the purchaser found himself unable to obtain possession. The Privy Council held that from the time when he found himself unable to obtain possession he had a right to sue for his purchase-money upon a failure of consideration and that the case fell within article 97 and that in any case it must fall either within 97 or 62. That is exactly what was decided in *Janak Singh* v. *Walidad Khan* (1), and we hold that we are bound to follow that view and to dismiss this appeal with costs.

Appeal dismissed.

(1) (1915) 13 A. L. J., 669.

(2) (1892) I.L.R., 19 Calc., 123.

MISCELLANEOUS CIVIL.

Before Justice Sir Cecil Walsh and Mr. Justice Banerji.

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May, 9.

IN THE MATTER OF SHIB LAL, GANGA RAM.*

Act No. XI of 1922 (*Indian Income-Tax Act*), *section* 4—*Income-tax*—"*Agricultural income*"—*Stone quarries*—*Profits not exempt from assessment to income-tax because they have already been taken into account in the assessment of land revenue.*

There is no provision in the Income-Tax Act which exempts from liability to assessment profits from stone quarries, not being agricultural income, which have already been taken into account in assessing land revenue.

This was a reference made by the Commissioner of Income-Tax for the United Provinces under section 66 (2) of the Indian Income-Tax Act, 1922. The facts of the case sufficiently appear from the order of the Court.

Munshi *Narain Prasad Ashthana*, for the applicant.

The Government Advocate (Pandit *Uma Shankar Bajpai*), for the Crown.

WALSH and BANERJI, JJ. :—We have no doubt as to what the answer to this question must be. The assessee is the owner and occupier of certain land in the Agra district which contains valuable stone quarries. These he has been working at a profit for a very considerable time. In 1879, when the land in question was assessed for revenue purposes, the extract from the Settlement Officer's note, which forms part of this case, shows that the revenue was assessed against the then owner upon the basis of the rental value arrived at by taking into account the profits which he was making from the working of the quarries. That would be quite correct if the problem to be solved was the rental value of the land. It was not cultivated land, although it had been cultivated. The Settlement Officer says :—

* Miscellaneous Case No. 415 of 1927.

"Large areas of cultivated land have been gradually absorbed by the quarries." Taking into account the average income from the quarries, and adding it to the supposed rental value of the rest of the land, he arrived at an annual figure of Rs. 1,380. He does not profess to have arrived at a really accurate figure. Indeed, he says that the figures are below the mark, and that in later years the profits have very much increased. But whether the assessee has been paying too much or too little, there is no doubt that from 1879 he has been paying in the shape of revenue a contribution to the public funds, based upon the profits made from the quarries. The question is whether that relieves him from the undoubted statutory duty of making a return of the profits which he makes from the quarries and of being assessed thereon for the purpose of income-tax. As to his *primâ facie* liability to pay income-tax upon the profits of the quarries, there can be no doubt. Section 4 provides for that in the plainest terms. Certain exemptions from liability to income-tax are provided in section 4, and of these the only one material to this case is agricultural income. Therefore we have to see whether the assessee can bring himself within the exemption. Agricultural income means rent or revenue derived from land which is used for agricultural purposes and is either assessed to land revenue or subject to a local rent collected by a Company. Nobody can seriously contend that profits from the working of quarries and the sale of stone is agricultural income within the meaning of that definition, or that the quarries themselves are land used for agricultural purposes. The assessee, therefore, fails to bring himself within the exemption. His real complaint of course is that in being assessed for income-tax upon the profits derived from the quarries, he is paying to some extent twice over, but in order to obtain exemption from liability under the Income-Tax Act he would have to

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show that there was some provision in the Act which exempted profits which had been either taxed or taken into account in assessing revenue for some other State purpose. There is no such provision in the Act. The Income-Tax Act is of a much later date than the settlement in question, and no doubt the contingency which has occurred in this case, namely, of an assessee paying already to some extent tax in respect of profits arising from his business, by reason of the fact that they had been taken into account in assessing revenue by the revenue authorities, was overlooked. This, however, is no concern of the Income-Tax authorities, who have only to administer the Act as they find it. Whether the fact that a later Act has imposed a revenue tax upon the profits of the quarries, which the revenue authorities have already taken into account in assessing rental value for another purpose, affects the question between the revenue authorities and the present assessee in respect of his liability to pay revenue, is a question which we cannot decide. We merely content ourselves with saying that unless there is some provision in the revenue law which makes it clear that a double tax is intended to be made in respect of such sources of profit, the assessee appears to have a strong ground for applying to the revenue authorities for reconsideration of the rental value, on the ground that part of the land in respect of which he has been assessed for revenue has been assessed on the basis of the profits he is making from the working of the quarries, because the result of this decision will be, unless some amelioration is provided by the revenue authorities, that he will have to pay in respect of these profits twice over.

The answer to the question which is contained in paragraph 6 of the stated case is "No".

Under the circumstances we think that both parties ought to pay their own costs, and we assess the fee of

the Government Advocate at Rs. 100. Any amount deposited by the assessee will be returned to him.

Reference answered in the negative.

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IN THE MATTER OF SHIB LAL, GANGA RAM.

Before Mr. Justice Boys and Mr. Justice Kendall.

HAIDARI BEGAM AND OTHERS (DEFENDANTS) *v.* SRIMAN THAKUR LAKSHMI NARAINJI MAHARAJ (PLAINTIFF) AND MUSAMMAT SUNDAR AND OTHERS (DEFENDANTS).*

1927 *May*, 9.

Act (Local) No. II of 1901 *(Agra Tenancy Act), sections* 164 (2), 165 *and* 166—*Lambardar and co-sharer—Liability of representative of deceased lambardar for the negligence or misconduct of his predecessor.*

A plaintiff can, in a suit against the lambardar, prove negligence or misconduct with a view to getting a decree against the lambardar personally or, in a suit against a holder of the assets of the lambardar, can prove the negligence or misconduct of the deceased lambardar in order to get a decree against the estate of the deceased lambardar in the hands of such holder.

The words " plaintiff " and " defendant " as used in sub-section (2) of section 164 are merely synonyms for the " co-sharer " and " lambardar " referred to in sub-section (1), just as they are used in section 165. *Dip Singh* v. *Ram Charan* (1), and *Bharat Singh* v. *Tej Singh* (2), referred to.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Maulvi *Muhammad Abdul Aziz*, for the appellants.

Dr. *M. L. Agarwala*, for the respondents.

BOYS and KENDALL, JJ.—This is a suit under section 164 of the Tenancy Act for profits by a co-sharer against the heirs of a lambardar. It has been found not merely that there were no reliable accounts of actual

* Second Appeal No. 731 of 1925, from a decree of R. L. Yorke, District Judge of Bulandshahr, dated the 27th of February, 1925, reversing a decree of A. Shakur, Assistant Collector, first class of Bulandshahr, dated the 22nd of September, 1923.

(1) (1906) I.L.R., 29 All., 15. (2) (1917) I.L.R., 40 All., 246.

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collections, but affirmatively that the accounts furnished by the defendants are false and misleading; and the lower appellate court has therefore given the plaintiff a decree based on the full amount of the jamabandi. This decree has not been limited to the assets of the deceased lambardar which may have come into the hands of the defendants as his heirs. No argument was addressed to us on behalf of the appellant that the decree ought, in any event, to have been so limited; but, for reasons to which we will refer later, we are of opinion that the decree should have been so limited.

First, it has been contended that no decree should have been given against the defendants beyond such amount as may have been found proved to have been actually collected; but in face of the finding that the accounts furnished are false and misleading and that there is no reliable evidence of actual collections, no such decree would, in any case, be possible. Next, it has been contended that no decree of any sort can be given against the defendants based on the negligence or misconduct of the deceased lambardar in carrying out his duty to make collections. This argument is, we think, based on an entire misconception of the rulings upon which reliance has been placed. It is argued that sub-section (2) of section 164 has no application at all where it is not the lambardar himself who is being sued but where the suit has been brought in the first place, as in this case, against the heirs of the lambardar. The argument for the appellants has been entirely founded on certain remarks in the cases of *Dip Singh* v. *Ram Charan* (1) and *Bharat Singh* v. *Tej Singh* (2). At page 17 of the report in the former case there is the following passage:—

"At first sight it might appear that the heir or representative of the lambardar would be so liable in respect of the negligence or misconduct of his predecessor in title, but

(1) (1906) I.L.R., 29 All., 15. (2) (1917) I.L.R., 40 All., 246.

if this had been the intention of the legislature, we should expect to find in sub-section (2) instead of the word 'defendant' the word 'lambardar'. That word does not occur in sub-section (2) of section 164. We are, therefore, of opinion that the successor in title of a deceased lambardar is not liable to account for profits which his predecessor may have failed to collect or which he permitted to remain uncollected owing to negligence or misconduct."

To appreciate the meaning of this passage it is only necessary to consider what were the facts of that case. The defendants were the son and two brothers of the deceased lambardar. With the deceased they constituted a joint Hindu family. This (we have examined the original record) was actually pleaded by the plaintiff and not controverted by the defendants. They were also joint lambardars in succession to the deceased lambardar. The plaint further alleged that the joint family property had benefited by the collections made by the deceased lambardar who had also been negligent. The suit was against the defendants *as present* lambardars in regard to their own conduct and also sought to hold them responsible for the liabilities of the deceased lambardar and asked for a decree against the defendants for a lump sum of the total amount due on both accounts.

Their Lordships suggested in the passage quoted that sub-section (2) of section 164 only made the "defendant" liable for his negligence or misconduct and did not make either his heir (this was *obiter* as the suit was against the defendants as succeeding "lambardars" and not as "heirs" of the deceased lambardar) or his representative so liable, and concluded by deciding that "*the successor in title* of a deceased lambardar is not liable" for the negligence or misconduct of the deceased.

In fact no question could arise in that case of the liability of the heir, as the family of the defendants and the deceased lambardar was joint and section 53 of the present Code of Civil Procedure did not then exist.

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We are, however, in full accord with the *obiter dictum* that the heir would not be liable and the decision that the successor in title to the office of lambardar would not be liable.

Our agreement in this view is not, however, influenced by the use of the word " defendant ". It would have been just the same if the words " co-sharer " and " lambardar " had been used; for there is no principle on which the heir or the successor in title as lambardar could possibly be held personally liable for negligence or misconduct of the deceased lambardar.

If indeed the learned Judges meant, as is contended before us, something more than this and intended to suggest that in their opinion the use of the word " defendant " in sub-section (2) of section 164 indicated that negligence or misconduct of a deceased lambardar died with him and could not be proved for the purpose of fixing liability even on his estate in the hands of heirs, we could not follow them; for in our view no such effect could result from the use of the word " defendant ", which appears to be used merely as a variant of but as synonymous with " lambardar ", as it is similarly used in section 165 where it could not possibly have any special significance.

But, in fact, we think the learned Judges clearly meant nothing more than that no personal liability could attach to the heir or successor in title.

But, further, in that case there was no decision and could be no decision as to whether the assets of the deceased lambardar could be liable in the hands of the defendants. The family was a joint family and there could be no question of heirs, and there was no suggestion of there being any self-acquired property of the deceased lambardar, and, as we have noted, section 53 of the Code of Civil Procedure, assuming that it would have helped the plaintiff, did not exist. The only question for decision

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and the only question decided was,—Can a lambardar as successor in title of a deceased lambardar be held personally liable for the consequences of negligence or misconduct of his predecessor? The case is, therefore, in no way opposed to the proposition that if there are assets of the deceased lambardar in the hands of the defendants, those assets would be liable for the consequences of negligence or misconduct of the deceased.

The next case to which we were referred is *Bharat Singh* v. *Tej Singh* (1). That was a suit brought originally against the lambardar himself for actual collections and what he should have collected. He died during the pendency of the suit, and his son was brought on the record as heir to his assets. This last fact appears clearly from the referring order of Mr. Justice WALSH. The son was brought on the record not in his personal capacity but as holding the assets; and, as Mr. Justice WALSH put it, the sole question was " What was the liability in his life-time of the lambardar and what was the liability of his estate after his death "? Mr. Justice WALSH referred the case because there was a considerable body of authority, as he put it, for the proposition that the liability of the lambardar for negligence did not survive his death—a proposition with which he disagreed. The Full Bench held that the liability would survive. As Mr. Justice BANERJI phrased it :—

" On principle it does not seem that the assets of the deceased lambardar should escape liability simply because the said lambardar who had neglected to make collections or was guilty of gross misconduct happened to die after the expiry of the year during which the collections had to be made."

He further remarked :—

" In any case the liability of the representative of the lambardar would not be a personal liability."

Without following the reasoning of the learned Judge in its entirety as to the import of the words " plaintiff "

(1) (1917) I.L.R., 40 All., 246.

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and " defendant ", with these expressions of opinion we are in entire agreement.

Two isolated phrases in the judgements in this case have been pressed upon us on behalf of the appellant. Mr. Justice BANERJI said on page 253 :—

" If the person who was sued was the representative of the lambardar, he would be the defendant in the suit and he would not be liable according to the language of the section [sub-section (2) of section 164], as the misconduct or negligence could not be his misconduct or negligence. However, we are not called upon to decide that question in this case."

Mr. Justice PIGGOTT said :—

" He himself could not be held liable for any negligence or misconduct on the part of his father."

Neither of these passages supports the appellant here. They do not, in our opinion, purport to hold anything more than that the heir would not be personally liable, and they do not support the proposition that the estate of the deceased lambardar would not be liable in the hands of his heir. There is nothing in either of the two cases which to our mind is opposed to the conclusion that in this case the plaintiff was entitled to a decree against the estate of the deceased lambardar in the hands of the defendants.

In our view section 164 really does not give rise to any difficulty. Sub-section (1) provides for the simple suit for collections against the lambardar himself. Sub-section (2) merely says that he may further be held liable for non-collections due to negligence or misconduct. We agree with Mr. Justice WALSH that the words " plaintiff " and " defendant " are merely synonyms for the " co-sharer " and " lambardar " referred to in sub-section (1), just, as we have noted, as they are used in section 165 where the change cannot have any special significance. The legislature, in framing section 164, had not in view at all suits against the assets of a deceased lambardar in the hands of others, but left such a case, as it

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well might, to be dealt with in accordance with the ordinary principles governing all cases where it is sought to make the assets of a deceased person liable, merely putting the propriety of applying those principles beyond doubt by enacting in section 166 that the word " lambardar " includes his heirs, etc.

A plaintiff can in a suit against the lambardar prove negligence or misconduct with a view to getting a decree against the lambardar personally, or in a suit against a holder of assets of the lambardar can prove the negligence or misconduct of the deceased lambardar in order to get a decree against the estate of the deceased lambardar in the hands of such holder.

We think, therefore, that the plaintiff in this case was entitled to a decree to the full amount of the *jama-bandi*, but that that decree should have been limited to the assets of the deceased lambardar in the hands of the defendants. The decree of the lower appellate court is modified accordingly. Parties will bear their own costs of the appeal.

Decree modified.

Before Justice Sir Cecil Walsh and Mr. Justice Banerji.

RAM PRASAD AND OTHERS (DEFENDANTS) *v.* MITHAN LAL (PLAINTIFF) AND SHYAM LAL AND OTHERS (DEFENDANTS).*

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May, 9.

Act (Local) No. III of 1901 *(United Provinces Land Revenue Act), sections* 107 *and* 111—*Partition—Objections based on adverse possession overruled as frivolous—Question of proprietary title—Appeal.*

In a suit for partition, whether a question of proprietary title is raised or not depends on the exact objections raised by an objector, and when an objector claims to be in possession

* Second Appeal No. 714 of 1925, from a decree of J. Allsop, District Judge of Aligarh, dated the 10th of January, 1925, confirming a decree of M. Abdurrab, Assistant Collector, first class of Aligarh, dated the 12th of March, 1924.

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of any particular plot of land by adverse possession, that certainly raises a question of title.

Where an Assistant Collector rejected objections taken to the partition, on the ground that they were, on the face of them, frivolous, it was *held*, that he must be deemed to have chosen to decide the question raised in the objections on the merits, and therefore an appeal lay to the District Judge.

Ram Narain v. *Jagan Nath Prasad* (1), and *Bhagwan Dut* v. *Brij Bhukan* (2), followed. *Nand Ram* v. *Brahmkhayal* (3), and *Muhammad Nasar-ullah Khan* v. *Muhammad Ishaq Khan* (4), referred to.

THIS was an appeal by defendants in a partition application filed by one Mithan Lal under section 107 of the Land Revenue Act. Mithan Lal applied for perfect partition of his share in the *mahal*. Notice of this application was issued to all the recorded co-sharers in the *mahal*, and the appellants filed objections to partition. They claimed to be the separate and exclusive owners of the portions of the *mahal* which they were in possession of, on the ground that about 50 years ago, by a private partition between the co-sharers, they had got the land, and on the ground of adverse possession also. They pleaded that even the inhabited area had been separated by the co-sharers and each co-sharer was in possession of his separate portion, and had built separate houses, but that only one *haveli* and a room were joint, and four cultivated plots in the outlying land and several uncultivated plots were also joint. The Assistant Collector, by his order of the 12th of March, rejected these objections on the ground that they were quite frivolous on the face of them. The objectors appealed to the District Judge of Aligarh, who rejected the appeal on the ground that no appeal lay to him. In his judgement he stated as follows:—

"I may say at once that in view of several rulings of the Board of Revenue and of the Hon'ble High Court, it can be said almost with certainty that the objections did in

(1) (1915) I.L.R., 38 All., 115. (2) (1928) 75 Indian Cases, 868.
(3) (1914) 22 Indian Cases, 949. (4) (1910) I.L.R., 32 All., 523.

fact raise questions of proprietary rights, but it is also clear that the learned Assistant Collector did not treat them as raising any such questions. He treated the applications as objections with regard to separate possession of land in which there was a joint proprietary right."

The objectors thereupon appealed to the High Court.

Munshi *Panna Lal*, for the appellants.

Babu *Surendra Nath Gupta*, for the respondents.

The judgement of the Court (WALSH and BANERJI, JJ.), after stating the facts, thus continued :—

The objectors have come up in appeal before us and Mr. *Panna Lal*, on behalf of the appellants, has submitted that the order of the Assistant Collector rejecting their objection, whether on good, bad, or indifferent grounds, was a decision of the question of title which had been raised by them, and that the learned District Judge ought to have disposed of the appeal on the merits. The learned vakil for the respondents has urged that the question raised by the objectors does not amount to a question of proprietary title, and in any event, upon the objection, the partition officer will have to partition the *mahal* and allot portions to each of the co-sharers, and therefore it is of no moment whether the Assistant Collector did or did not decide that particular areas belonged to particular co-sharers. He has relied on the case of *Nand Ram* v. *Brahm Khayal* (1) and *Muhammad Nasar-ullah Khan* v. *Muhammad Ishaq Khan* (2), and has submitted that when a co-sharer claims to be in possession of a particular plot of land and claims that particular plot of land, it cannot be said that any question of proprietary title has been raised; and therefore no appeal lay to the District Judge.

Whether a question of proprietary title is raised or not depends on the exact objections raised by an objector, and when an objector claims to be in possession of any

(1) (1914) 22 Indian Cases, 949. (2) (1910) I.L.R., 32 All., 523.

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particular plot of land by adverse possession, that certainly raises a question of title. Whether there is any force in the objection raised is a different matter altogether. We think that when an objection is raised as to the proprietary title there are three courses open to the Assistant Collector, namely, (1) to decline to grant the application for partition until the question in dispute has been determined by a competent court, (2) to require any party to the case to institute a suit in the civil court, (3) to proceed to inquire into the merits of the objection. In this case when the learned Assistant Collector went on to say in his order that the objection on the face of it was frivolous, we think that he must be deemed to have chosen to decide the question raised in the objection on the merits. Therefore an appeal lay to the learned District Judge. When a question of proprietary title is decided by the revenue court, or when that court directs a party to go to the civil court to have his rights declared, it is impossible to say that no question of proprietary title has been raised. In the case of *Ram Narain* v. *Jagan Nath Prasad* (1) a Bench of this Court held that when an Assistant Collector directed a party to have his right declared in a civil court upon objections raised to the partition, a question of proprietary right had been raised in the case. We think that the case of *Bhagwan Dut* v. *Brij Bhukan* (2) lays down the correct procedure to be followed in cases where objection to partition is made before an Assistant Collector. We are, therefore, of opinion that this appeal must be allowed and the case sent back to the learned District Judge of Aligarh to decide the appeal of the appellant before him on the merits. The question that the learned Judge will have to consider upon the materials on the record is whether there had been a previous partition and whether the parties were in possession of their respective shares as owners. Costs will abide the result.

Appeal allowed.

(1) (1915) I.L.R., 38 All., 115 (2) (1923) 75 Indian Cases, 868.

Before Justice Sir Cecil Walsh and Mr. Justice Banerji.

MAHBUB ALI (DEFENDANT) *v.* MUHAMMAD HUSAIN AND ANOTHER (PLAINTIFFS).* 1927 *May*, 11.

Civil Procedure Code, order XXI, rule 2—Uncertified payment out of court in respect of mortgage decree—Certification refused—Right of mortgagor to get back money so paid.

Plaintiff paid a sum of money to defendant to be applied by him *pro tanto* in satisfaction of a mortgage decree (preliminary) which defendant held against plaintiff. The payment, however, was made out of court and an application for its certification to the court was resisted and ultimately rejected. *Held*, that, although the payment, not having been certified, could not be taken into account as a part satisfaction of the decree, the plaintiff was entitled, as the consideration for the payment had failed, to claim back the money which he had paid, as money in the hands of the defendant received by him to the use of the plaintiff. *Sital Singh* v. *Baijnath Prasad* (1), referred to.

The facts of this case sufficiently appear from the judgement of the Court.

Munshi *Binod Bihari Lal*, for the appellant.

Maulvi *Muhammad Abdul Aziz*, for the respondents.

WALSH and BANERJI, JJ. :—This case is in a nutshell. The facts are that two sums of Rs. 125 and Rs. 200 have been received by the defendant, under certain special circumstances, with the intention that they should be applied to a mortgage decree which he held against the plaintiff. It is always troublesome in these cases to give an accurate description of such a payment. The Rs. 200 paid is perhaps an illustration. Defendant No. 2 paid that to defendant No. 1 at the request of the plaintiff. If the parties were *ad idem*, and the defendant, being an honest person, was willing to receive that amount

* Second Appeal No. 792 of 1925, from a decree of Bhagwan Das, Subordinate Judge of Bulandshahr, dated the 13th of March, 1925, reversing a decree of Nawab Husain, Munsif of Khurja, dated the 14th of April, 1924.

(1) (1922) I.L.R., 44 All. 668.

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towards his decree, he naturally would agree that that amount should be certified to the court. For good reasons or bad the Code requires that such payment out of court should be certified, otherwise an execution court cannot take notice of it. Probably it was thought that it would be better that the execution court should not have continual suits brought before it as to whether a payment had been made or not. The plaintiff, being advised by a lawyer who thought order XXI, rule 2, applied, made an application to the court for a certificate. The defendant resisted, and the application was eventually rejected. There is therefore no certified payment. There is no payment which any court executing a decree could take into account, and the object with which it was done has failed. The matter is a little complicated in its legal aspect by the decision of our learned brothers in the case of *Sital Singh* v. *Baijnath Prasad* (1), where it was held that where there is a mortgage decree a payment of this kind, made after the preliminary decree and before the final decree, should be brought into account when the final decree is passed. We do not dissent from that ruling, or see why anybody should do so. They do not suggest that if this is not done, money, which admittedly belongs to the mortgagor, becomes the money of the mortgagee. That would be to turn it into a gift, and people do not make gifts in that way, and the courts do not compel people to make gifts against their will. The authorities cited by the learned Judge of the court below, which are very old and which do not appear to have been questioned, show clearly that in spite of there being another remedy, namely, by a certified payment, if that falls to the ground, the plaintiff does not lose his right to the money. We should sum it up according to the broad principles of common law in this way. The payment was made under the instructions of the plaintiff for a particular purpose. Owing to the conduct of the defendant, to whom the payment

(1) (1922) I.L.R., 44 All., 668.

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was made, that purpose has failed. He declined to accept it on the terms on which it was offered to him. There has, therefore, been a total failure of consideration and, in accordance with the language of the old pleaders, the money is money in the hands of the defendant received by him to the use of the plaintiff, or, in other words, it is *contra æquum et bonum* that he should retain it. This is a cause of action as old as the hills and is really what the plaintiff was asserting. The decision is obviously right and the appeal must be dismissed with costs.

Appeal dismissed.

Before Sir Grimwood Mears, Knight, Chief Justice and Mr. Justice Lindsay.

NARSINGH DAS (PLAINTIFF) *v.* GOKUL PRASAD AND ANOTHER (DEFENDANTS).*

1927
May, 11.

Act No. I of 1872 *(Indian Evidence Act), section* 33—*Witness—Effect of death of witness before cross-examination is complete.*

If a witness under examination by a court dies before his cross-examination is completed, no part of his evidence can be made use of. *Boisagomoff* v. *The Nahapiet Jute Company* (1), followed.

The facts of this case sufficiently appear from the judgement of the Court.

Mr. *B. E. O'Conor*, for the appellant.

Dr. *Surendra Nath Sen*, Babu *Durga Charan Banerji*, Babu *Piari Lal Banerji* and Munshi *Narain Prasad Ashthana*, for the respondents.

MEARS, C. J. and LINDSAY, J. :—This was a suit originally instituted to recover the value of ornaments alleged to be worth Rs. 5,993 and to recover Rs. 6,007 which was alleged to have been taken out of court by the

* First Appeal No. 49 of 1923, from a decree of Farid-ud-din Ahmad Khan, Subordinate Judge of Allahabad, dated the 25th of October, 1922.

(1) (1901) 5 C.W.N., (Notes), p. ccxxx.

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defendants, on the ground that they were accountable in both these respects to the plaintiff.

The learned Subordinate Judge dismissed the suit and when this matter came up in argument in First Appeal, it became apparent that complete justice could not be done between the parties if the claim was limited in the manner in which the plaintiff by his plaint had limited it. We, therefore, sent the matter down to the lower court to consider particularly the state of account in respect of certain zamindari property. It was alleged that a lady, Musammat Chandrawal, the mother of Narsingh Das, owned zamindari property, and that for a period of some eight years, from 1908 to 1916, that zamindari property had been managed by the defendants. The findings have been returned to us, and in this Court even wider arguments have taken place on both sides, and in the result we have had, upon very scanty material, to go into the whole of the transactions between these parties, to arrive at the best and fairest decision we can.

The first difficulty that we have been met with is this. On the 15th of February, 1922, Musammat Chandrawal was examined on commission and had on that day concluded her examination-in-chief and had been under cross-examination for a considerable period. Her cross-examination, we are told, occupied some seven pages of print. By that time 9 o'clock in the evening had arrived, and not unnaturally the parties wished to separate. Musammat Chandrawal was not well at that moment. There arose a discussion as to when next her cross-examination should be continued, and whilst the pleader for Narsingh Das was willing for the lady to be examined on the next or any of three or four subsequent days, the pleader for the defendants had other engagements and the matter was left open. In that state of affairs Musammat Chandrawal died on the 19th of February, 1922—it is said she died of plague. The plaintiff naturally wished

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that evidence to be used in the lower court and here. It was excluded in the lower court and we have been obliged to exclude it here, being guided by the decision which is reported in *Boisagomoff* v. *The Nahapiet Jute Company* (1) and on a consideration of the terms of section 33 of the Evidence Act, and we have had to decide that the evidence cannot be received because the evidence was not concluded. That is to say, although her examination-in-chief was concluded, it was open to the defendants to argue that a subsequent cross-examination would have destroyed to a great extent the effect of the evidence-in-chief, and therefore one could not take an incomplete deposition of the lady and pay any attention to it. We have no doubt that the argument put forward by the defendants was a good argument, and we did decide to exclude her incomplete statement, and it has not been presented to us.

[The judgement then proceeded to discuss the other evidence and concluded as follows :—]

We therefore reverse the decision of the learned Subordinate Judge and give to each side proportionate costs according to success and failure in all courts.

Before Mr. Justice Boys and Mr. Justice Kendall.

RAM PRASAD, SHIAM SUNDAR LAL AND OTHERS (DEFENDANTS) *v.* RAMJI LAL (PLAINTIFF).*

1927
May, 11.

Act No. IX of 1872 *(Indian Contract Act), sections* 23 *and* 30 *—Principal and agent—Wagering contract—Suit between principal and agent.*

In the United Provinces a claim by a principal against an agent or by an agent against his principal arising out of a contract is not affected by the circumstance that, as between the principal and the other party to the contract, it may be a

* Second Appeal No. 22 of 1925, from a decree of Har Govind Baijal, Additional Subordinate Judge of Meerut, dated the 23rd of October, 1924, reversing a decree of R. Saran, Additional Munsif of Meerut, dated the 31st of May, 1924.

(1) (1901) 5 C.W.N., (Notes), p. ccxxx.

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wagering transaction. *Sobhagmal Gianmal* v. *Mukundchand Balia* (1) and *Hardeo Das, Nanak Chand* v. *Ram Prasad, Shyam Sundar* (2), referred to.

The facts of this case sufficiently appear from the judgement of the Court.

Dr. *Kailas Nath Katju*, for the appellants.

Babu *Piari Lal Banerji*, for the respondent.

BOYS and KENDALL, JJ. :—This is a defendant's appeal arising out of a suit for money, that is, certain profits on " khatti " transactions, a sum of money deposited by the plaintiff with the defendant, his commission agent, by way of cover or security, and, lastly, interest on the above sums. The facts are simple. The plaintiff employed the defendant as his agent to carry on what were admittedly wagering transactions dealing with the nominal purchase and sale of " khattis ". We are not concerned with considering the nature of the transaction between the plaintiff and the third party. So far as they were concerned, the transactions were admittedly of a wagering nature. The suit is between the plaintiff, principal, and the commission agent, and in view of the decision of their Lordships of the Privy Council in *Sobhagmal Gianmal* v. *Mukundchand Ballia* (1), decided on the 29th of July, 1926, it is only with the nature of the transaction as between the plaintiff, principal, and the defendant commission agent, that we are concerned.

In the Privy Council case to which we have referred, the plaintiff respondent was an agent on commission, suing the defendant who had instructed him to make certain contracts on his behalf. It was found by their Lordships that as between the agent (who did not disclose his principal's name to the third party) and the third party the contracts were genuine transactions and not " wagering contracts " at all, but in the matter of

(1) (1926) I.L.R., 51 Bom., 1. (2) (1926) I.L.R., 49 All., 438.

the dispute between the commission agent and the defendant their Lordships clearly based their decision solely on a consideration of the nature of the contract between the commission agent and his principal. They found that though the agent, as acting for an undisclosed principal, was liable to the third party, yet as between the agent and his principal the former had no financial interest except in his commission, and the fact that there was a further collateral understanding between the agent and his principal that the former would by covering contracts, or otherwise, provide for or take the goods or pay the difference on the principal's behalf did not render the contract between the principal and agent a wagering contract. Their Lordships concluded :—

> "As between them neither party stands to win from or lose to the other according to fluctuation of price or in any other event. The very essence of a wager between them is thus absent."

Those remarks apply wholly to the present case. There is nothing to show that according to the contract as between the plaintiff and the defendant, commission agent, either party stood to win from or lose to the other according to the fluctuation of price or in any other event. Regarded from this standpoint, then, the contract as between the plaintiff and the defendant was wholly legal.

Nor in a case arising in these Provinces is the contract between the plaintiff and the defendant, commission agent, affected with illegality by reason of the fact that the contract as between the plaintiff and the third party is void as a wagering contract. In Bombay there is the Special Local Act, Bombay Act No. III of 1865, and in England there is the Gaming Act of 1892 (55 Victoria Cap. IX), according to which Acts the fact that the principal contract is a wagering contract affects prejudicially all collateral contracts. We are not concerned here to pursue the question whether in such cases money

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paid or received in pursuance of the collateral contract so affected can be recovered or not. There being no such Acts in force in this province, the contract as between the plaintiff and the commission agent being itself legal is not affected by the fact that the contract between the principal and the third party was a wagering contract.

The local Bombay Act No. III of 1865 was followed after seven years by the Contract Act of 1872. This latter Act does not in any way specifically embody such provisions as are to be found in the local Bombay Act and the English Gaming Act of 1892. It is certainly arguable that, though section 30 of the Contract Act only makes all wagering contracts void and not illegal, such contracts are further illegal in view of section 23 of the Contract Act, in that they are opposed to public policy. That particular view has, however, never been given effect to by the courts in this province, and its correctness is not beyond doubt. We prefer, therefore, to follow the current of authority in this Court and, applying to the case the remarks that we have quoted from the judgement of their Lordships of the Privy Council, we hold that the plaintiff in this case is entitled to have his contract with the commission agent, the defendant, regarded as a perfectly legal contract and to be entitled to the return of his earnest-money.

Further, as to profits received from the third party for payment to the plaintiff, it is clear that the fact that the third party could not have been sued on the wagering contract does not entitle the agent to refuse to hand over profits actually paid to him by the third party : *Hardeo Das, Nanak Chand* v. *Ram Prasad, Shyam Sundar* (1), the latest of a series of authorities based on English decisions.

It is admitted that the amount of security was Rs. 200. We have only to consider, then, whether the

(1) (1926) I.L.R., 49 All., 438.

receipt of profits by the agent has been proved or not. That is a question of fact, but, were it not for a special circumstance, it might have to be considered whether the inference which the lower appellate court drew from the *parchas* written by the defendant and from his account books that the defendant had received the money was a justifiable inference in law. It is clear that if the *parchas* only stated, as is contended by the appellant, what the result of the transactions would be when one or other party paid, i.e. only set out liabilities, they could not be regarded as proof of actual receipt by the agent of the money. Such was the situation in the case before their Lordships of the Privy Council to which we have referred. But here we are absolved from determining whether it was a reasonable and permissible inference from the evidence that the defendant actually received the money or not, for in this particular case it has been found that, while the plaintiff believed the defendant to be entering into transactions with third parties, the defendant was actually entering into the transaction on his own account. There was, therefore, no actual third party in this particular case who could offer the money to the defendant for payment to the plaintiff. The statement of accounts, therefore, given by the defendant to the plaintiff must be taken as evidencing not only that a certain amount of profits were due from the defendant on his own account to the plaintiff, but that such amount of profits had been transferred from the defendant's own private purse to the defendant as agent for the principal. We hold, therefore, that the plaintiff was entitled in this suit to recovery of the earnest-money and of the profits actually received, and we see no reason to differ from the view of the lower court as to the rate of interest which should be allowed to him. The result is that the appeal is dismissed with costs.

Appeal dismissed.

REVISIONAL CRIMINAL

Before Mr. Justice Dalal.

EMPEROR *v.* NASIR AHMAD AND OTHERS.*

1927
May, 12.

Criminal Procedure Code, section 107—Security for keeping the peace—Accused expressing their willingness to execute bonds—Bonds executed thereupon, without evidence being taken—Legality.

Where an accused, called upon to give security for keeping the peace, said in terms, before any prosecution evidence was recorded, that he was willing to give security, it was *held* that this was sufficient proof that it was necessary for keeping the peace that he should execute a bond, and it was not necessary that any prosecution evidence should be called before taking a bond from him. *Chander Shekhar* v. *Emperor* (1), *Emperor* v. *Ghariba* (2), *Jagdat Tewari* v. *Emperor* (3), *Ram Charan* v. *Emperor* (4), *Emperor* v. *Mul Chand* (5), *Prathipati Venkatasami* v. *Emperor* (6), *Ram Chandra Haldar* v. *Emperor* (7), and *Prem Singh* v. *Emperor* (8), referred to.

Upon a report of the police a Magistrate issued notices to certain persons to show cause why they should not be ordered to execute bonds, without sureties, for keeping the peace for a certain period. On the 28th of October, Abdul Raoof appeared in the court of the Magistrate and stated "*Muchalka dena chahta hun*," i.e. he was desirous of giving a bond. The court thereupon ordered that if he was so desirous he should file the bond; and on the 29th of October he filed the bond. On the 12th of November the other applicants desired that they should be permitted to enter into personal bonds. They made this statement, as appeared from the record, after the court had written the words "P.W.1." presumably in preparation of recording the statement of the first prosecution witness. As these applicants expressed their willingness to enter into personal bonds, no evi-

* Criminal Revision No. 251 of 1927, from an order of H. Beatty, Sessions Judge of Moradabad, dated the 8th of January, 1927.

(1) (1919) 54 Indian Cases, 411.
(2) (1923) I. L. R., 46 All., 109.
(3) (1920) 54 Indian Cases, 784.
(4) (1925) 24 A.L.J., 317.
(5) (1914) I.L.R., 37 All., 30.
(6) (1907) I.L.R., 30 Mad., 330.
(7) (1908) I.L.R., 35 Calc., 674.
(8) (1917) 41 Indian Cases, 671.

dence was recorded; they were allowed to enter into personal bonds for keeping the peace for one year on the same day, the 12th of November, 1926. The appeals of these applicants to the Sessions Judge were dismissed. They then came to the High Court in revision.

Mr. *B. Malik*, for the applicants.

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

The judgement of the Court (DALAL, J.), after stating the facts as above, thus continued :—

The learned counsel, who put before me all the case-law on the subject, argued that under section 118 an order to execute a bond may be passed only when upon inquiry it is proved that it is necessary for keeping the peace that the person in respect of whom the inquiry is made should execute a bond. The inquiry ordered under section 118 is "such inquiry"—a repetition of the words used in section 117(2). Such inquiry, according to section 117(2), shall be made, as nearly as may be practicable, where the order requires security for keeping the peace, in the manner hereinafter prescribed for conducting trials and recording evidence in summons cases. The procedure as to the trial of summons cases is laid down in chapter XX of the Code of Criminal Procedure. Under section 242, when the accused appears, the Magistrate has to tell him the particulars of the offence of which he is accused and ask if he has any cause to show why he should not be convicted. All this was done in the present case by the issue of the notice to Abdul Raoof, and in the case of the others when they appeared before the court, and the court made preparation for recording the evidence for the prosecution. Then under section 243, if the accused admits that he has committed the offence of which he is accused, his admission shall be recorded as nearly as possible in the words used by him; and, if he shows no sufficient cause why he should not be convicted, the Magis-

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trate may convict him accordingly. In the present case statements of the applicants were recorded as far as possible in their own words; in one case, on the order-sheet, and in the other case, by the Magistrate himself on the 12th of November. The note of the Magistrate is:—"At this stage the accused" (that is those other than Abdul Raoof) "pray that they may be allowed to enter into personal bonds for Rs. 500 each, without sureties, for keeping the peace for a period of one year." It was argued that this was not an admission that they were ready to commit a breach of the peace. When an accused called upon to give security for keeping the peace, says in terms that no prosecution evidence may be recorded and he is willing to give security, it is sufficient proof that it is necessary for keeping the peace that he should execute a bond. It should not be forgotten that the Magistrate had previous information on which he issued notice under section 107, and the willingness of the accused himself to give a bond substantiated that information and proved its truth. If the accused did not admit the danger there was as to his breaking the peace, he need not have spoken words which would convey that impression to any ordinary reasonable being. In the present case, in my opinion, there was a full inquiry as laid down in section 117 (2) of the Code in the manner directed in chapter XX of the Code. I fail to see what further inquiry was possible. Personally I should consider a Magistrate exceedingly foolish if, in spite of the person to whom the notice was issued expressing his willingness to enter into a bond, he went on recording prosecution evidence which was not likely to favour the accused. From the attitude taken up by the accused it was certain that he would not cross-examine the prosecution witnesses. It would be reducing proceedings to a farce to insist upon a Magistrate to go on recording prosecution evidence solemnly when the accused person took no interest in it and was ready to admit its truthfulness.

As regards the case-law on the subject, the only case of this Court which supports the argument put forward by the learned counsel is that of *Chander Shekhar* v. *Emperor* (1). As it is not reported in any of the two recognized law journals of this Court, namely, the Allahabad Law Reports and the Allahabad Law Journal, I do not feel myself bound to follow it, particularly when in *Emperor* v. *Ghariba* (2) Mr. Justice WALSH, in delivering judgement dissenting from this case, noted that he had consulted Mr. Justice RYVES who delivered the judgement in *Chander Shekhar's* case, and that Mr. Justice RYVES had then agreed with his view. Mr. Justice WALSH, in the judgement he delivered in the case of *Jagdat Tewari* v. *Emperor* (3), gave it as his opinion that the better procedure would be to record evidence for the prosecution in a case like that. He did not lay down any definite rule on the subject, and did not hold that it would be illegal not to record such evidence. He appears to have modified his view subsequently when he delivered his judgement in the case of *Emperor* v. *Ghariba* (2). The facts of the case of *Ram Charan* v. *Emperor* (4) were different. There, in a trial upon a notice to bind over for good behaviour, where the procedure applicable would be that of a warrant case, the Magistrate, who directed that security should be taken, did not act on any plea of guilty, but held a full inquiry and formed his opinion of the accused person's bad character on the basis of that inquiry, and when the convicted person appealed, the learned Sessions Judge referred only to the accused's offer to give security and the learned Judge of this Court very rightly criticized this procedure of the Sessions Judge and referred the case back to him to decide on the merits whether the applicant was a bad character or not. With all respect, it may be submitted that the general observations

(1) (1919) 54 Indian Cases, 411.
(2) (1923) I.L.R., 46 All., 109.
(3) (1920) 54 Indian Cases, 784.
(4) (1925) 24 A.L.J., 317.

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of the learned Judge on page 318 of the report are possibly a little too wide. The learned Judge is reported to have said :—

"In cases arising under section 107 of the Code of Criminal Procedure it has been held times without number that the Magistrate should hold an independent inquiry and should not act on the mere readiness of the accused to furnish security."

I have already noticed two of the cases cited by the learned Judge. The third case cited was that of *Emperor* v. *Mul Chand* (1), decided by a Judge of considerable reputation of this Court. The facts in *Mul Chand's* case were not in conformity with the facts of the present case. There Mul Chand did not admit that he was a person likely to commit a breach of the peace, but rather put in a long statement alleging the contrary. What he admitted in the statement was only enmity, and from that statement the Magistrate was not justified in presuming that Mul Chand was likely to commit a breach of the peace. The learned Judge, as was to be expected from him, if I may say so with respect, has made reference to section 242 of the Code of Criminal Procedure, and it is obvious that he would not have ordered further inquiry if he had accepted Mul Chand's statement as an offer to give security for keeping the peace. The point of difference between this judgement and the judgements of others quoted by the learned counsel is that in the other judgements reference to chapter XX of the Code is entirely omitted. The case of *Prathipati Venkatasami* v. *Emperor* (2) of the Madras High Court is somewhat different, as there was no statement of the accused but only a statement of his vakil. The Calcutta and the Punjab cases, however, fully support the contention of the learned counsel. They are *Ram Chandra Haldar* v. *Emperor* (3) and *Prem Singh* v. *Emperor* (4). In neither of these cases

(1) (1914) I.L.R., 37 All., 30.
(2) (1907) I.L.R., 30 Mad., 330.
(3) (1908) I.L.R., 35 Calc., 674.
(4) (1917) 41 Indian Cases, 671.

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the point appears to have been noted that the inquiry referred to in section 118 is one laid down in section 117 (2) and is similar to that detailed in chapter XX for summons cases. When there is such a glaring omission in the discussion of the question, I think it will not be presumptuous for me to differ from those rulings.

I would ordinarily have referred this matter to a Bench of two Judges, but refrain from doing so in this case, because even if I had accepted the learned counsel's view of law I would not have interfered. It is obvious to me that the applicants are playing the court a trick. They and the members of the opposite faction have all been bound over. In order that the trial court may obtain bonds from the members of the opposite faction, they were ready to offer themselves to be bound over, but now after bonds were taken from the members of the opposite party and those persons did not appeal, they seek to take an advantage by discovering a flaw in the procedure of the Magistrate. Whatever the law on any matter may be, I shall never be induced to grant relief to any person whom I suspect of an attempt to cheat a court.

I dismiss these applications.

Applications dismissed.

APPELLATE CIVIL.

Before Mr. Justice Sulaiman and Mr. Justice Banerji.

MUHAMMAD BASHIR KHAN AND ANOTHER (PLAINTIFFS) *v.* KULSUM BIBI AND OTHERS (DEFENDANTS).*

1927 *May*, 16.

Act (Local) No. XI of 1922 (Agra Pre-emption Act), section 2—Act No. XVI of 1908 (Indian Registration Act), section 47—Registration—Applicability of the Agra Pre-emption Act, 1922, to a sale-deed executed before but registered on the date when the Act came into force.

Held that the Agra Pre-emption Act, 1922, did not apply to a sale-deed which was executed on the day previous to

* First Appeal No. 175 of 1925, from a decree of Ganga Prasad Varma, Second Additional Subordinate Judge of Cawnpore, dated the 14th of January, 1925.

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its coming into operation, though registered on the latter date. *Sarju Prasad* v. *Bhagwati Prasad* (1) and *Kalyanasundaram Pillai* v. *Karuppa Mooppanar* (2), referred to.

This was a plaintiff's appeal arising out of a suit for pre-emption of shares sold in two mahals in village Mohammadpur Kalan. The property was transferred under a sale-deed, dated the 16th of February, 1923, which was presented for registration on the same date, but was actually registered on the 17th of February. The plaintiffs came into court both on the ground of Muhammadan law, the custom of pre-emption, and the provisions of the Agra Pre-emption Act of 1922. No evidence was led as regards the performance of any *talab*, and the case, so far as it was based on the Muhammadan law, was apparently not pressed. The trial court held that the transfer took place before the coming into force of the Agra Pre-emption Act and was, therefore, not governed by that Act. It also held that, inasmuch as there were single proprietors in both the mahals at the time when the *wajib-ul-arzes* recording an entry of a right of pre-emption were prepared, there could be no custom, nor even any contract. The suit was accordingly dismissed. The plaintiffs appealed.

Maulvi *Mukhtar Ahmad*, for the appellants.

Maulvi *Muhammad Abdul Aziz*, for the respondents.

The judgement of the Court (SULAIMAN and BANERJI, JJ.), after stating the facts as above, thus continued :—

In appeal it has not been pressed before us that the entry made at the time of the settlement, when there were single proprietors in both the mahals, could in any sense be the record of a custom of pre-emption, or a binding contract between co-sharers. The only point alleged is that the case is governed by the new Act. The learned vakil for the appellant argues that, inasmuch

(1) (1925) 23 A.L.J., 373. (2) (1926) I.L.R., 50 Mad., 193.

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as under article 10 of the Limitation Act the period fixed for suits for pre-emption is one year from the date of the registration of the document, the cause of action to institute a suit arises only when the registration has been effected. He, therefore, argues that it must be supposed that the present transaction was complete only when the registration was effected.

It is not disputed that the new Act came into force on the 17th of February, 1923. In fact this has been clearly so held in the case of *Sarju Prasad* v. *Bhagwati Prasad* (1).

Section 2 of the Agra Pre-emption Act provides that nothing in the Act shall affect any right in respect of any *transfer made* before the commencement of the Act. We have nothing to do, therefore, with the period of limitation prescribed for suits for pre-emption. The only point to consider is when the transfer which is sought to be pre-empted actually came into effect. The argument on behalf of the appellant ignores the provisions of section 47 of the Registration Act under which a registered document operates from the time it would have commenced to operate if no registration thereof had been required or made, and not from the date of its registration. Although the sale-deed was incomplete till the formality of registration had been gone through, once that requirement was fulfilled the sale took effect from the date of its execution. This is quite clear on the wording of section 47. As pointed out by their Lordships of the Privy Council in the case of *Kalyanasundaram Pillai* v. *Karuppa Mooppanar* (2), registration is a necessary solemnity in order to the enforcement of a gift of immovable property, but it does not suspend the transfer of the gift until registration actually takes place. This is a necessary consequence of the provision that registration does not depend upon the consent of the

(1) (1925) 23 A.L.J., 373. (2) (1926 I.L.R., 50 Mad., 193.

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executant, but is the act of an officer appointed by law for the purpose, who must register the document if duly executed and presented as required, neither death nor revocation by the executant being a ground for refusing registration. In our opinion, therefore, the transfer in this case was, in the eye of the law, made on the 16th of February, 1923, and not on the 17th. Section 2 of the Act, therefore, makes the new Act inapplicable to this transfer.

The result, therefore, is that this appeal is dismissed with costs.

Appeal dismissed.

REVISIONAL CIVIL.

Before Justice Sir Cecil Walsh and Mr. Justice Iqbal Ahmad.

SARWAN PANDE (DEFENDANT) *v.* JAGAT PANDE (PLAINTIFF) AND DUDHNATH SINGH AND OTHERS (DEFENDANTS).*

1927
May, 16.

Civil Procedure Code, section 104(f)—Order filing or refusing to file an award made out of court—Appeal—Court-fee.

Held that an appeal lies, under section 104(*f*) of the Code of Civil Procedure, against an order filing or refusing to file an award without the intervention of the court, and that where such an appeal was to a District Judge against the order of a Munsif, the proper court-fee was eight annas.

The facts of this case are fully stated in the judgement of the Court.

Munshi *Haribans Sahai*, for the applicant.

Mr. *Sankar Saran*, for the opposite parties.

WALSH and IQBAL AHMAD, JJ. :—This application in revision arises out of an arbitration award made without the intervention of the court. The plaintiff, opposite party, filed an application under paragraph 20 of the second schedule of the Civil Procedure Code to have the award made a rule of the court. The

* Civil Revision No. 159 of 1926.

learned Munsif disposed of the application by an *ex parte* order in the following terms :—

"Judgement—Suit for the enforcement of an award. Defendants' pleader states that he has no instructions. Suit is heard *ex parte*. Claim is proved. Decreed with costs."

Against this order an appeal was filed by the present applicant in the court of the District Judge. The District Judge set aside the order of the learned Munsif and remanded the whole case for trial *de novo*. Against the order of remand passed by the learned District Judge there was an appeal to this Court. But this Court held that as only one appeal is allowed by the Code against an order, a second appeal against the order of remand passed by the learned District Judge was not maintainable. Accordingly the appeal filed by the plaintiff opposite party in this Court was dismissed.

After remand the learned Munsif overruled all the pleas urged in defence by the present applicant and ordered the award to be filed, and a decree to be passed in favour of the plaintiff opposite party for possession of a certain zamindari share. Against the order of the learned Munsif the present applicant filed an appeal in the lower appellate court. The memorandum of appeal bore a court-fee stamp of annas eight. The Munsarim reported that the decree passed by the learned Munsif being in accordance with the award, no appeal lay against that decree, and the appeal being against the decree, the memorandum of appeal was insufficiently stamped. On this report being put up before the lower appellate court, that court dismissed the appeal on the ground that the deficiency in court-fee not having been made good by the present applicant, the appeal could not be entertained.

In our judgement the court below was wrong in holding that the memorandum of appeal was not sufficiently stamped. It is to be noted that an appeal is allowed by

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section 104 (*f*) of the Code of Civil Procedure against an order filing or refusing to file an award without the intervention of the court. That being so, the present applicant was entitled to file an appeal against the order of the learned Munsif by which he ordered the award to be made a rule of the court. The appeal being against an order, the requisite court-fee stamp was of eight annas, and the memorandum of appeal, being stamped with a court-fee stamp of that value, was sufficiently stamped and the appeal ought to have been heard on the merits.

Accordingly we allow this application, set aside the order of the court below and remand the case to that court with directions to re-admit the appeal to its original number and to hear and dispose of the same according to law. Costs here and hitherto shall abide the result.

Application allowed.

FULL BENCH.

Before Mr. Justice Lindsay, Mr. Justice Sulaiman and Mr. Justice Mukerji.

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May, 17.

MUHAMMAD MUSLIM AND OTHERS (APPLICANTS) *v.* MAHARANIA AND OTHERS (OPPOSITE PARTIES).*

Act (Local) No. III of 1926 *(Agra Tenancy Act), sections* 44, 230 *and* 273—*Suit for ejectment of a trespasser by proprietor of agricultural land—Jurisdiction—When suit entertainable by civil court.*

Plaintiff, as proprietor of an agricultural holding, brought a suit in the Munsif's court for the ejectment of defendant on the ground that the latter was a trespasser. Defendant pleaded that he was a tenant of the plaintiff, that rent had been accepted from him and that under section 44 of the Agra Tenancy Act, 1926, the suit was not entertainable in a civil court. *Held*, on a reference under section 267 of the Act, that the suit fell within the four corners of section 273 and was entertainable by the civil court. But if the court was

* Miscellaneous Case No. 89 of 1927.

satisfied that the suit related to an agricultural holding, it must frame an issue on the defendant's plea of tenancy and submit the record to the appropriate revenue court for the decision of that issue only, and ultimately decide the suit accepting the finding of the revenue court on the issue so referred.

The jurisdiction of the civil court to refer such an issue is expressly provided by section 273, and is not intended to be barred by the provisions of section 230.

Section 44 was probably enacted in order to allow facilities to an owner of agricultural land in seeking a speedy remedy through the revenue court if the defendant has taken possession without his consent and if he is prepared to accept up to the maximum prescribed. *Debi Sahai* v. *Daulat* (1), referred to.

THIS was a reference under section 267 of the Agra Tenancy Act, 1926, and arose out of a suit brought in the Munsif's court, Fatehpur, by Manohar Singh to eject the defendant Sheo Saran. The plaintiff's case was that he was the proprietor of the land, which was in the occupation of a tenant Ram Sahai, who died on the 20th of June, 1926, without leaving any heir, with the result that the tenancy reverted to the plaintiff. He alleged that the defendant had no right to occupy the land, but he took wrongful possession as a trespasser at the beginning of the rainy season preceding the suit. The defendant, on the other hand, pleaded that he was a tenant of the plaintiff, that from him rent had been accepted, and that under section 44 of the new Tenancy Act (Act III of 1926) the suit was not entertainable in a civil court. The learned Munsif considered that the question of law whether the civil or the revenue court was the correct *forum* was one of difficulty, and accordingly made this reference.

Munshi *Kailash Chandra Mital*, for the applicants.

Munshi *Rudra Narain Srivastava*, for the opposite parties.

(1) (1927) 8 L. R., Revenue, 104.

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The judgement of the Court (LINDSAY, SULAIMAN and MUKERJI, JJ.), after reciting the facts as above, thus continued :—

The allegations in the plaint make out a case of trespass, pure and simple. A trespass on land amounts to an infringement of civil right and a remedy *primâ facie* should be sought in a civil court. Unless, therefore, the new Act expressly ousts the jurisdiction of the civil court to try such civil cases, it would be difficult to hold that the Munsif has no jurisdiction to entertain the suit.

The contention on behalf of the defendant is that a suit for ejectment of a trespasser comes under section 44 of the Act, and in view of the provisions of section 230, read with the fourth schedule, such a suit is exclusively triable by the revenue court. On the other hand, reliance is placed on behalf of the plaintiff on the provisions of section 273, and on the judgement in the case of *Debi Sahai* v. *Daulat* (1), decided on the 17th January, 1927, by a learned Judge of this Court. The last mentioned case, though it should have been decided by a Bench of two Judges, does contain an expression of opinion in favour of the plaintiff on the main ground that, on a contrary view, section 273 would become superfluous. It was a case under the Act of 1926, though by a slip the Act of 1901 was mentioned.

We have to see whether the intention of the legislature was to oust the jurisdiction of the civil court completely in respect of suits relating to agricultural land, or whether the object merely was to remove the uncertainty as to which was the tribunal to which the aggrieved party should go.

If it be held that as regards all agricultural land the civil court has no jurisdiction to entertain any suit, the consequences may be far-reaching. Part of an area may

(1) (1927) 8 L. R., Revenue, 104.

be agricultural land and another part of it non-agricultural. Are two separate suits to be necessarily instituted in the civil and the revenue courts, neither of which can be stayed under section 10 of the Code of Civil Procedure and in both of which the same question of title may have to be fought out? Similarly, apart from contests between rival claimants to the proprietary interest, there may a defendant denying the plaintiff's title and pleading *jus tertii*. Can the jurisdiction of the civil court be barred as regards all such cases?

Under section 34 of the old Act a person occupying land without the consent of the landholder was liable to pay rent. There was no express provision in the section that he could be ejected. The courts used to treat him as a tenant from year to year and eject him under section 58. Section 44 of the new Act cures the omission to a certain extent by expressly declaring that such a person is liable to ejectment. The words "and in contravention of the provisions of this Act" are also new and cause some difficulty by implying that a mere trespasser has taken possession in contravention of the provisions of the Act. Probably these words mean nothing more than that such possession is unauthorized by the Act. Another material difference between the new and the old sections is that instead of a liability to pay rent there is now a liability to ejectment and to pay damages, but a maximum limit of four times the annual rental value is fixed for the damages. In view of the express provision for ejectment it is not now absolutely necessary to say that the plaintiff must treat the defendant as a tenant, although the expression "on the suit of the landholder" supports such a view, for a landholder under section 3, sub-clause (6), can be only such person to whom rent is, or but for a contract express or implied would be, payable. If, therefore, it be the case of both parties that the defendant is a trespasser, it would be difficult to describe the suit as

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one by a landholder. The important point to consider, however, is that there is a maximum limit prescribed for the amount of damages which can be claimed, whereas no such limit can be fixed for mesne profits. The plaintiff in a suit under section 44 cannot claim more than four times the annual rental, although, if he were suing in a civil court, he might under special circumstances get mesne profits much larger in amount. Could it have been the intention of the legislature to take away the civil right of a proprietor to claim the full amount of mesne profits from a trespasser who has entered upon his property wrongfully? We are of opinion that no such intention in the mind of the legislature can be inferred. Section 44 was probably enacted in order to allow facilities to an owner of agricultural land in seeking a speedy remedy through the revenue court if the defendant has taken possession without his consent and if he is prepared to accept damages up to the maximum prescribed.

Section 230 corresponds to the old section 167. It confers exclusive jurisdiction on the revenue court as regards suits and applications of the nature specified in the fourth schedule, in respect of which adequate relief can be obtained in that court. It certainly follows that where a suit is expressly provided for as being cognizable by the revenue court, the civil court would have no jurisdiction to try it. The fourth schedule, however, contains a heading, which is undoubtedly a part of it, showing that the jurisdiction, both original and appellate, specified in each group is subject to the provisions of sections 241, 271 and 273. A suit under section 44 falls in group B (Serial No. 2) and is, therefore, apparently subject to the provisions of section 273. That, in our opinion, means that the original as well as appellate jurisdiction of the revenue court to try a suit under section 44 is subject to the provisions of section 273.

Now section 273 corresponds to the old section 202 and provides that if in any suit relating to an agricultural holding instituted in a civil court the defendant pleads that he holds such land as the tenant of the plaintiff or of a person in possession holding from the plaintiff, the civil court shall frame an issue on the plea of tenancy and submit the record to the appropriate revenue court for the decision of that issue only. Under the old law the defendant used to be called upon to institute a suit in the revenue court. Now an issue only is to be sent. Section 273 really contemplates a suit filed in a civil court which relates to an agricultural holding, but in which the plaintiff does not admit that the defendant is his tenant and the defendant pleads that he is the plaintiff's tenant, and in which, therefore, the plea of tenancy is to be determined by the revenue court. If it were to be held that all suits relating to land over which the defendant has obtained possession without consent fall under section 44, and that section 230 confers exclusive jurisdiction in respect of it on the revenue court, then the provisions of section 273 would become altogether superfluous, for it would be difficult to imagine any case which would be covered by this section and would not fall under section 44. No doubt the word "holding" in the section is an unhappy expression, because under its very definition it implies a parcel or parcels of land held under one tenure or one lease, engagement or grant. If the plaintiff does not admit the defendant to be his tenant, he certainly does not admit that the land is held by him under one tenure, lease, engagement or grant. This word is, however, borrowed from the old section 202 and the same technical difficulty arose even under the old Act. But in all cases where the property in dispute was agricultural land and the civil court found that it was so, it used to pass an order under section 202, although the plaintiff did not

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admit that the defendant was holding the land from him. When the legislature has copied out part of the language of the old section, it may be presumed that it accepted the interpretation put upon those expressions by the courts under the old law. Section 273 would, therefore, be applicable to a case where though the plaintiff does not admit that the defendant is holding under any tenure, lease, engagement or grant from him, and the defendant is pleading that he is the plaintiff's tenant, the court is satisfied that the property in dispute in the case is an agricultural holding, that is to say, a parcel or parcels of land let or held for agricultural purposes. When the civil court is satisfied that the property is of this kind, it has no option but to frame an issue on the defendant's plea of tenancy and refer the same to the revenue court. The jurisdiction of the civil court to refer such an issue is expressly provided by section 273, and is not intended to be barred by the provisions of section 230.

On this interpretation of section 273 we are of opinion that the present suit clearly falls within its four corners, and that the civil court has jurisdiction to entertain it. But if it is satisfied that the suit relates to an agricultural holding, it must frame an issue on the defendant's plea of tenancy and submit the record to the appropriate revenue court for the decision of that issue only, and ultimately decide the suit accepting the finding of the revenue court on the issue so referred.

This is our answer to the reference.

Reference answered

APPELLATE CIVIL.

Before Mr. Justice Ashworth and Mr. Justice Kendall.

GAYA PRASAD AND ANOTHER (JUDGEMENT-DEBTORS) *v.* MURLIDHAR (DECREE-HOLDER).* 1927 *May*, 17.

Act No. IV of 1882 (*Transfer of Property Act*), *section* 53—*Fraudulent transfer—Hindu law—Joint family property—Partition after decree obtained against the father.*

The sons in a joint Hindu family at any time up to attachment of the joint family property can enter into a partition with their father with the express object of avoiding attachment of what up to the time of the partition has been joint family property, and if they do so, their individual property acquired by the partition will not be liable to attachment. The partition can only be set aside on evidence showing fraud, and the mere fact of the desire to save their property will not be sufficient to justify an inference of fraud. *Indar Pal* v. *The Imperial Bank of India* (1), distinguished. *Bhagwant* v. *Kedari* (2), *Krishnasami Konan* v. *Ramasami Ayyar* (3), and *Peda Venkanna* v. *Sreenivasa Deekshatalu* (4), followed.

THE facts of this case were as follows :—

A mortgage of joint family property was executed by the father and one out of several sons. The mortgagee sued on his mortgage, impleading not only the actual mortgagors but the other sons as well. He obtained a decree, which was a simple money decree, against the father and the son who was a party to the mortgage, and the suit was dismissed as against the

*Second Appeal No. 1352 of 1926, from a decree of Piare Lal, Additional District Judge of Aligarh, dated the 18th of May, 1926, reversing a decree of Raj Rajeshwar Sahai, First Additional Subordinate Judge of Aligarh, dated the 13th of March, 1926.

(1) (1916) I.L.R., 37 All., 214. (2) (1900) I.L.R., 25 Bom., 202.

(3) (1899) I.L.R., 22 Mad., 519. (4) (1917) I.L.R., 41 Mad., 136.

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other sons. When, however, the mortgagee decree-holder applied for attachment of the joint family property, he was met by the objection that since the date of the decree the joint family property had been partitioned, and, therefore, the shares in the hands of the other sons were not liable to attachment and sale. The trial court allowed the objection. In appeal the Additional District Judge held that the partition between the father and his sons (the present appellants) "was executed during the pendency of the suit and to all intents and purposes was executed in order to defeat the appellants' claim." He accordingly set aside the order of the court below. The respondents appealed to the High Court.

Babu *Piari Lal Banerji* and Babu *Surendra Nath Gupta*, for the appellants.

Munshi *Panna Lal*, for the respondent.

The judgement of ASHWORTH, J., (after setting forth the facts as above) thus continued :—

In this second appeal by the sons it is contended that there was no evidence to justify the finding of the lower appellate court that the partition of the 15th of August, 1925, amounted to a fraudulent transfer within the meaning of section 53 of the Transfer of Property Act, and that the sons had a right to partition the joint family property in order to avoid the risk of their father's judgement-creditor attaching the whole of the joint family property in execution of the decree against the father.

The appeal is resisted on two grounds. The first ground taken up is that from the moment when a father incurs a debt which is not for immoral purposes, the joint family property, as it exists at the time when the debt is incurred, becomes from that moment liable for

the debt of the father. No authority has been shown to us to justify this contention. The contrary appears to be too well established to need reference to any decision. The rule, as set forth in Mulla's Hindu Law, is as follows :—

"It is now well established that the special liability imposed by the Hindu law on sons and grandsons as such to pay the debts of their father and grandfather is not a personal liability. It is confined to their undivided interest in the joint family property. That is to say, the separate property of the sons and grandsons is in no case liable for the debts of their father and grandfather; the liability arises only— *Ashworth, J.*

(1) if the sons and grandsons are joint with their father and grandfather, and

(2) there is joint family property."

To hold otherwise, it appears to us, would in effect entirely nullify the rule of law, so emphatically laid down by their Lordships of the Privy Council, that a father cannot bind the joint property by a transfer which is not for family necessity or in consideration of an antecedent debt. If, from the moment that he incurred a personal debt, the joint property became liable, notwithstanding that it might subsequently be the subject of partition, then the transfer by the father would be as operative against the joint property as if there had been no such rule of law to the contrary.

We hold that the liability imposed on the sons only continues as long as they are joint in property. The partition which took place in this case just before the respondent obtained his decree, if not liable to be set aside, was a partition which put an end to the existence of joint family property, that is to say, property in the joint ownership of the appellants and respondent. From that moment there was no property in which the sons were interested that could be attached or sold in execution of the decree against the father. The sole

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question is whether that partition is liable to be set aside or avoided by the respondent. The lower appellate court apparently relied on section 53 of the Transfer of Property Act. It appears that the evidence relied upon for attracting that section was the fact that the effect of the partition was to defeat or delay the claim of the respondent which was then *sub judice*, but the mere fact that the partition had this effect (which effect may be admitted) will not justify the application of section 53 of the Transfer of Property Act. What may be described as the leading decision on the matter is contained in *Bhagwant* v. *Kedari* (1). It was there held that the mere probability or even certainty of a transfer having the effect of delaying or defeating the attachment by a judgement-creditor was not a sufficient reason for invoking section 53, and that, in such a case, there must either be the additional fact of the transfer being for a grossly inadequate consideration or something else which would raise a presumption of fraud. There can be no question in this case of inadequate consideration. What the father gave by the partition agreement was joint ownership in the whole property in consideration of receiving absolute ownership of a portion of the property. Again the judgement of the lower court fails to point out any other evidence on which an inference of fraud could be based. We must, therefore, presume that there was no other evidence. Indeed, it is clear that the lower appellate court thought that it was sufficient to show that the result of the partition would be to delay or defeat the respondent. We fail to see how it can be fraudulent for a son to exercise a right of partition which pre-existed the incurring of the debt by the father. Accordingly we are of the opinion that the sons of a father at any time up to attachment of the joint family property can enter into a partition with their father, with

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(1) (1900) I.L.R., 25 Bom., 202.

the express object of avoiding attachment of what up to the time of the partition has been joint family property. If they do so, their individual property acquired by the partition will not be liable to attachment. The partition can only be set aside on evidence showing fraud, and the mere fact of the desire to save their property will not be sufficient to justify an inference of fraud. The only decision at all to the point which has been brought to our notice is that of *Indar Pal* v. *The Imperial Bank of India* (1). This was a decision by a two Judge Bench of this Court. Both the Judges held that a partition between a father and sons effected just after a decree against the father could be held by the lower court to have been collusively and fraudulently made to defeat the creditor. The reported judgement does not make it clear beyond all doubt that the partition took place between the date when the creditor obtained his decree and the date when attachment of the property was applied for. If it took place after attachment was applied for, then the decision in no way disagrees with the view taken by us. Assuming, however, that it took place before attachment was applied for, no facts are set forth in the judgement to show on what basis the trial court had held the partition to be made collusively and fraudulently. It is not stated in the decision that the mere fact that it had the effect of defeating or delaying the attachment of the joint family property was sufficient *per se* to justify a finding that the partition was collusive and fraudulent. The decision, therefore, affords no safe precedent. If it could be construed to mean that the mere fact that the object of the sons was to save the joint family property from the hands of the creditors of the father rendered the partition voidable, then we should feel constrained to disagree with it.

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(1) (1916) I.L.R., 37 All., 214.

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For the above reasons we are of the opinion that the lower appellate court in holding that the partition deed was voidable under section 53 of the Transfer of Property Act (it is clear that that court invokes section 53 because it uses the words "in order to defeat the appellants' claim") was misconstruing the section. In other words, the court was applying a rule of law that did not exist in the form applied. We would, therefore, allow this appeal and restore the decision of the trial court. The appellants should get their costs in the lower appellate court and in this.

KENDALL, J. :—I agree with the order passed. In my opinion the dictum in Mulla's Hindu Law that a son's pious obligation to pay his father's personal debt is not a personal liability must be interpreted to mean that it will not follow the son after he has been separated from his father by a partition. It is clearly wrong to argue that it is a liability that is attached to his property, because then we should be faced with this position that a father by incurring a personal debt could create a charge on the joint family property of himself and his sons. It is well known that he cannot do so except for legal necessity or for antecedent debt. When a partition takes place, however, as has been held by a number of authorities, among which may be mentioned *Krishnasami Konan* v. *Ramasami Ayyar* (1) and *Peda Venkanna* v. *Sreenivasa Deekshatalu* (2), the son rids himself of his liability to pay his father's debt, provided that the partition takes place before the property has been actually attached.

Appeal allowed.

(1) (1899) I.L.R., 22 Mad., 519. (2) (1917) I.L.R., 41 Mad., 136

REVISIONAL CIVIL.

Before Mr. Justice Dalal.

HASAN ALI AND OTHERS (APPLICANTS) *v.* LACHHMAN PRASAD AND OTHERS (OPPOSITE PARTIES).* 1927 *May*, 17.

Civil Procedure Code, section 115; *order XXIII, rule* 1—*Revision—Wrong exercise of discretion in allowing withdrawal of suit not a ground for revision.*

The fact that a court has probably exercised a wrong discretion in allowing a plaintiff to withdraw his suit with liberty to bring a fresh one is not a ground for revision within the purview of section 115 of the Code of Civil Procedure. *Jhunku Lal* v. *Bisheshar Das* (1), followed.

THIS was an application in civil revision from an order passed by the Munsif of Gorakhpur allowing a plaintiff to withdraw his suit with liberty to bring a fresh one. The facts of the case sufficiently appear from the judgement of the Court.

Maulvi *Muhammad Abdul Aziz*, for the applicants.

Munshi *Harnandan Prasad* and Munshi *Ram Nama Prasad*, for the opposite parties.

DALAL, J. :—The objection raised by the opposite parties (plaintiffs) is that no application for revision lies. The plaintiffs sued in the court of the Munsif of Gorakhpur for recovery of possession of a certain portion of a market. After the proceedings had advanced, an application was put in by the plaintiffs for withdrawal of the suit. No specific grounds were mentioned in the application, but it was generally observed that there were some legal defects which would lead to the dismissal of the suit. On the presentation of this application there must have been some argument before the lower court,

*Civil Revision No. 82 of 1927.

(1) (1918) I.L.R., 40 All., 612.

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because the lower court gives a specific reason for granting the application for withdrawal. The statement in the order is :—

"The fact is that during the excavations of the *bazar* in suit some signs alleged before by the plaintiff were found; they showed that the plaintiff's claim was defective."

It is most likely that during the pendency of the suit some excavations were made which brought to light further evidence modifying or supporting the plaintiffs' suit. It was at the discretion of the lower court to grant permission for the withdrawal of a suit under order XXIII, rule 1, of the Code of Civil Procedure. The jurisdiction existed, and the question is whether the jurisdiction was exercised illegally or with material irregularity to bring the order within the provisions of section 115 of the Code of Civil Procedure.

A Bench ruling of this Court in the case of *Jhunku Lal* v. *Bisheshar Das* (1) laid down that, where the court had jurisdiction to grant leave to the plaintiffs to bring a fresh suit, the fact that the court may have exercised, and probably did exercise, a wrong discretion in granting the plaintiff's application was not sufficient to bring the case within the purview of section 115 of the Code of Civil Procedure. The applicants' learned counsel, Mr. *Aziz*, produced before me two rulings where a single Judge had distinguished the cases before him from the circumstances of the case of *Jhunku Lal* v. *Bisheshar Das* (1). He made a commendable research and also discovered an unreported decision of a Bench of this Court in Civil Revision No. 77 of 1926 to which I was a party. I have examined all those cases and am satisfied that there were points in them to distinguish them from the Bench ruling in 40 Allahabad. The case before me and Mr. Justice PULLAN was one out of the common, where

(1) (1918) I.L.R., 40 All., 612.

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we obtained the impression from the record that the learned Judge who granted permission of withdrawal desired to get rid of the suit which was a troublesome one. There are no such circumstances present in the revision application before me. As far as possible I must conform to the principles laid down in 40 Allahabad, and if I do so, I can see no reason for admitting this application for revision. It may be that the defendants suffer by the withdrawal, and that the discretion was wrongly exercised by the lower court. This Court has repeatedly requested subordinate courts not to grant applications for withdrawal light-heartedly. I do not, however, feel justified in admitting this revision and I dismiss it, but make no order as to costs.

Application dismissed.

APPELLATE CIVIL.

Before Mr. Justice Ashworth and Mr. Justice Kendall.

SITA RAM (DEFENDANT) *v.* NANKU AND OTHERS (PLAINTIFFS).*

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May, 17.

Act No. I of 1872 (*Evidence Act*), *section* 114—*Presumption*—*Civil Procedure Code*, *section* 100—*Second appeal*—*Failure of the court of first appeal to invoke a presumption of fact.*

In a suit for a declaration that a certain sale-deed ostensibly executed by *D* was forged, fraudulent and fictitious, it was found that the deed was as a matter of fact signed by *D*, by placing his thumb-impression on it. No evidence was led by the plaintiff to prove that the thumb-impression had been obtained in any manner which might render it invalid.

Held that, in the absence of any such evidence, the court was bound to draw the inference that the deed was properly

*Second Appeal No. 886 of 1925, from a decree of Hanuman Prasad Verma, Subordinate Judge of Benares, dated the 3rd of February, 1925, confirming a decree of M. M. Seth, City Munsif of Benares, dated the 21st of October, 1924.

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executed, and, as this was an inference of the kind illustrated in section 114 of the Indian Evidence Act, 1872, the failure to draw it was sufficient to support a second appeal. *Rance Surnomoyee* v. *Luchmeput Doogur* (1), and *Nilatatchi* v. *Venkatachala Mudali* (2), referred to.

THE facts of this case are fully stated in the judgement of ASHWORTH, J.

Munshi *Kamla Kant Verma*, for the appellant.

Dr. *N. C. Vaish*, for the respondents.

ASHWORTH, J. :—This second appeal arises out of a suit brought by the respondents Nanku and Sukhu, against one Sitaram, appellant, for a declaration that a sale-deed purporting to have been executed on the 2nd of June, 1923, by Deosaran defendant No. 2, (i.e. respondent No. 3) was forged, fraudulent and fictitious. The suit was decreed by the trial court on a finding that the defendant Sitaram had failed to prove the due execution of the deed by Deosaran his vendor.

On first appeal the Subordinate Judge of Benares found that there had been no clear issue in the trial court as to forgery, and that, by reason of the absence of a clear issue, the defendant No. 1 may have been led into supposing that he was not required to produce evidence of due execution of the deed by Deosaran. He accordingly framed an issue whether the sale-deed was genuine and had been executed by Deosaran, and took fresh evidence.

The defendant Sitaram produced a finger-impression expert. He gave evidence that the thumb-impression on the deed purporting to be that of Deosaran agreed with the undoubted thumb-impressions tendered in evidence. He also produced the scribe, by name Bishunath Singh, and one Ramsundar, who purported to be an attesting witness. The conclusion of the Subordinate Judge, after

(1) (1868) 9 W.R., C.R., 338. (2) (1862) 1 Mad. H.C.R., 131.

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hearing this evidence, was that (*a*) the thumb-impression on the deed did agree with Deosaran's thumb-impression, (*b*) that the thumb-impression suggested that one of the thumb-impressions of Deosaran was taken on the top of another thumb-impression of Deosaran, (*c*) that the scribe could not be believed, because he being a man of experience would never have allowed one thumb-impression to be taken on the top of another, but in the event of the first impression being obscure would have taken a second one on a different portion of the paper, and (*d*) that the other witnesses contradicted one another and the scribe. On these findings the lower appellate court came to an extraordinary conclusion. It was that somehow or other the thumb-impression of Deosaran had been fraudulently obtained upon the document, and that the defendant had failed to show that it was Deosaran's thumb-impression voluntarily impressed on the document. In order to give any meaning to this decision we have to suppose that the Subordinate Judge conceived the possibility either of a die having been made from some other thumb-impression of Deosaran and a forged impression by means of the die impressed on the document in question or that Deosaran's thumb-impression had been obtained when he was asleep or drunk.

The first question that arises in this appeal is whether in these circumstances we are entitled in second appeal to interfere with the finding of the Subordinate Judge. There can be no question that it was a finding of fact. As I shall subsequently show, the error of the lower appellate court was its failure to invoke a presumption of fact. The question then arises whether such a failure justifies interference in second appeal. The question has not been discussed at length in any decisions to which my attention has been directed. There is authority for holding that a second appeal may be entertained on the ground that the lower appellate court has

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failed to invoke a presumption of fact which would have shifted the burden of proof. A distinction, however, should, in my opinion, be made where the burden of proof is shifted by a presumption of fact, and where it is shifted by a mere inference. In the case of *Ranee Surnomoyee* v. *Luchmeeput Doogur* (1) a second appeal was allowed on the ground that the burden of proof, which originally was placed on the husband of a Muhammadan wife to prove some property his, because the property was in the name of the wife, was shifted from him upon proof by him that he had paid the purchase-price for the property and had had the property under his control. This decision was by no less an authority than PEACOCK, C. J. He held that a question of law was involved, because the Judge should have directed himself to draw this presumption from the facts mentioned. Again in *Nilatatchi* v. *Venkatachala Mudali* (2) it was held that silence on the part of the plaintiffs to take a step to claim property in the enjoyment of the defendant and over which the defendant was exercising acts of ownership raised a presumption of acquiescence. Both these cases go further than I should be disposed to go; for they interfered on the ground of failure to draw what I should regard as a mere inference and not as a presumption of fact. They are, however, both clear authority for interference in the present case. The distinction that I would draw between a mere inference and a presumption of fact, as already indicated, is that a presumption of fact is an inference drawn under section 114 of the Evidence Act and will include a presumption of the nature described in the illustrations. A presumption of fact should, in my opinion, also include anything that in English law (though not under the Indian Evidence Act) would rank as a presumption of law. The presumption

(1) (1868) 9 W.R., C.R., 338. (2) (1862) 1 Mad. H.C.R., 131.

which the lower appellate court failed to make in this case was a presumption that when signature on a document is proved by a certain person, it is for that person to prove that it was affixed by him otherwise than voluntarily. According to Taylor on Evidence, 3rd edition, page 145: "Courts of law are in general bound to presume *primâ facie* in favour of deeds which appear to have been duly executed." "Appear" must mean here "which bear a proved signature." The presumption, then, which the lower appellate court, I shall hold, ought to have made was a presumption that in England would have been a presumption of law. It is difficult to find a formula to express the difference between presumptions of fact of the nature indicated by me and mere inferences. Phipson in his work on Evidence says:—

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"The burden of proof may be shifted not alone by rebuttable presumptions of law but by presumptions of fact of the stronger kind or indeed by any species of evidence sufficient to raise a *primâ facie* case."

My conclusion then is that a second appeal lies on the ground of the failure of the lower appellate court to invoke a presumption of fact "of the stronger kind" (by which I mean inferences of the nature illustrated in section 114 of the Evidence Act and inferences that in English law would be legal presumptions), and that there is even authority for holding that the failure of the lower appellate court to draw any mere inference that it should have drawn would justify interference in second appeal, though I would not follow authority to this extent. The consequence is that in this case a second appeal, in my opinion, lies.

It appears desirable to state that the probabilities were all against this document being a forgery. Deosaran had mortgaged his land to the defendant Sitaram on the 12th of August, 1915, for Rs. 300. It is said that, by this sale-deed now impeached, on the 2nd of

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June, 1923, he sold the equity of redemption to Sitaram for another Rs. 400. Then we get the fact that he executed a further sale-deed in favour of the plaintiffs Nanku and Sukhu, on the 5th of June, 1923. He got by this last sale-deed a sum of Rs. 1,100. Consequently it was all to the interest of Deosaran to deny his execution of the sale-deed impeached in the present suit, and no one could place any reliance on his evidence. It does not appear that the Subordinate Judge did place any reliance on his evidence, but the case started with the probability in favour of the execution of the impeached document being greater than the reverse. Then we get the clear evidence of the thumb-impression expert that the thumb-impression mark on the document corresponds to Deosaran's genuine thumb-impression. This evidence is of much more value than the ordinary evidence of an expert. We are not aware that the test of similarity has ever failed. The Subordinate Judge admitted that this evidence conclusively proved the thumb-mark to correspond with that of Deosaran. This being so, he had evidence of a document which in other respects was not open to suspicion and was not improbable. He attempts to discount the evidence of the thumb-impression expert by his own impression that one thumb-mark had been placed on the top of another. This impression is not one that we are disposed to share. It was not shared by the thumb-impression expert himself. It appears then to us that at this stage it was for the plaintiffs to show that the thumb-impression of Deosaran had been obtained by some improper means, either when he was asleep or in some such way. There was a presumption of fact that the document which bore his thumb-impression was voluntarily executed by him. Instead of invoking this presumption the lower appellate court proceeded to require the defendant to produce all his evidence, and on the ground that this evidence was

discrepant it found that the defendant had failed to prove the genuineness of the document. This we consider to have been a failure to invoke the presumption that arose from the proof of the thumb-impression on the document being the thumb-impression of Deosaran. It is obvious that if a person, who has proved execution by showing that a signature or thumb-impression on a deed is the signature or thumb-impression of the alleged executant, is required to go on and prove, after a considerable lapse of time, due execution by putting forward an attesting witness and other witnesses whose story will agree in every detail, there will be a great risk of injustice and an intolerable burden thrown upon the parties setting up a document. This was not a document which required attestation. The lower appellate court should have in the circumstances of the case rested content with proof of the thumb-impression of Deosaran, in the absence of the plaintiffs being able to produce any evidence that the thumb-impression was improperly obtained. I consider, therefore, that the finding of the lower appellate court, though a finding of fact, was one based on its failure to presume the genuineness of the document in the absence of any evidence believed by the court led by the plaintiffs to prove that the deed was otherwise than properly executed. For these reasons, we would allow the appeal and dismiss the suit with costs throughout.

KENDALL, J. :—I agree. The lower appellate court has found that Deosaran's thumb-impression is on the sale-deed in suit. It did not, therefore, rely on the evidence of Deosaran himself in the first court to the effect that he had not put his thumb-mark on the sale-deed. Having arrived at this decision, the lower appellate court had no evidence whatever produced before it on which it could base a finding that the thumb-impression of Deosaran was put on the sale-deed in any irregular

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manner, and that finding is, therefore, not based on any evidence. For this reason I agree that we are justified in interfering with the decision of the lower court in second appeal.

Appeal allowed.

Before Mr. Justice Sulaiman and Mr. Justice Banerji.

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RUP KISHOR (PLAINTIFF) *v.* PATRANI AND OTHERS (DEFENDANTS).*

Act No. I of 1872 (*Indian Evidence Act*), *section* 32, *clause* (5)—*Evidence—Statements made* post litem motam—*Meaning of the expression "before the dispute arose."*

The expression "before the question in dispute was raised", as used in section 32, clause (5) of the Indian Evidence Act, 1872, does not necessarily mean simply before a suit has been filed; but before the dispute which afterwards culminates in a suit has arisen. *Kalka Prasad* v. *Mathura Prasad* (1), followed. *Bahadur Singh* v. *Mohar Singh* (2), and *Mauladad Khan* v. *Abdul Sattar* (3), referred to.

THE facts of this case are fully set forth in the judgement of the Court.

Munshi *Narain Prasad Ashthana*, for the appellant.

Babu *Piari Lal Banerji*, for the respondents.

SULAIMAN and BANERJI, JJ. :—This is a plaintiff's appeal arising out of a suit for recovery of possession of a share in villages Lilhar and Karanpur Pindri, by avoidance of a deed of relinquishment and a deed of transfer, dated the 7th of May, 1911, executed on behalf of the plaintiff, when he was a minor, by his natural father, Damodar Das.

The plaintiff's case, briefly put, is as follows :—Brij Kishor was the original owner of this property and had no child. Shortly before his death he gave an oral

*First Appeal No. 206 of 1924, from a decree of Tufail Ahmad, Subordinate Judge of Shahjahanpur, dated the 6th of February, 1924.

(1) (1908) I.L.R., 30 All., 510. (2) (1901) I.L.R., 24 All., 94.
(3) (1917) 15 A.L.J., 349.

permission to his wife, Musammat Durga Dei, to adopt a son, and then died in 1878. In 1905 Musammat Durga Dei, acting on this permission, adopted the plaintiff, and a deed of adoption was duly executed by her on the 11th of March, 1905. The plaintiff alleged that in a suit brought by Jivan Das and others, claiming to be the collaterals of Brij Kishore, against the present plaintiff Rup Kishor a compromise was arrived at under which the estate was divided in the ratio of 6 annas and 10 annas between the claimants and the present plaintiff, and a *tamliknama*, dated the 10th of August, 1906, was duly executed by the parties concerned. He then goes on to allege that a suit was brought by Kishan Chand, claiming to be the *bandhu* of the deceased son, against the collaterals of the present plaintiff, which was ultimately struck off on a compromise having been arrived at by the parties to that suit. In that suit the plaintiff was represented by his natural father, Damodar Das, who signed a deed of relinquishment and a deed of transfer, acting as the plaintiff's guardian. Under this deed the plaintiff relinquished all rights so far as the villages Lilhar and Karanpur Pindri were concerned. We may note in this connexion that these villages had been recovered by Kishan Chand from the transferee of Musammat Durga Dei by a separate suit in 1908, to which the present plaintiff was not a party. Kishan Chand had then succeeded as against the transferee in proving that he was the next heir of the last male owner. These villages were not in dispute in the suit brought by Kishan Chand in 1910 against the present plaintiff but were dealt with by the deeds of relinquishment and transfer mentioned above. The plaintiff's case is that these deeds are in no way binding upon him, inasmuch as they were executed without the sanction of the court, and his natural guardian had no authority to bind him.

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The contesting defendants are Kishan Chand's widow and her transferees. They deny that there was any permission given by Brij Kishor to adopt. The factum of adoption, however, is not disputed before us and is proved by overwhelming evidence. They further plead that the present claim is barred by limitation.

The learned Subordinate Judge has dismissed the suit; hence this appeal.

It may perhaps be difficult to support the finding that the plaintiff is bound by the compromise effected by his natural father Damodar Das. We, however, do not think it necessary to go into this question in detail because the appeal must fail on other grounds.

We take up first the question of the oral permission to adopt. This is said to have been given in 1878, and was certainly not acted upon for nearly 27 years. The burden, therefore, lies heavily on the plaintiff to establish that such an oral permission had actually been given.

There is now no oral evidence available of witnesses who could testify to the permission having been given in their presence. The plaintiff relies on certain documentary evidence in support of his case.

Reliance is placed on the deposition of Musammat Durga Dei, dated the 20th of May, 1905, in suit No. 2 of 1905, brought by Jivan Das and others to contest the adoption. It is obvious that the dispute had then clearly arisen between the alleged reversioners and the widow and her alleged adopted son, and any statement made by Musammat Durga Dei in the course of that litigation cannot be used in evidence against Kishan Chand and his representatives, who were no parties to that suit. Section 32, sub-clause (5), would be inapplicable as the statement was made after the dispute had arisen. Section 33 cannot apply inasmuch as the present defendants

had no opportunity to cross-examine Musammat Durga Dei.

Reliance is next placed on the statement of two witnesses, Kewal Kishan and Kundan, who were examined in another suit, No. 202 of 1906, brought by the plaintiff Rup Kishor against a third party Batuk Nath Sircar. To this suit also the present defendants were no parties. Batuk Nath Sircar denied the adoption of Rup Kishor and some evidence was led on the question. The case, however, was ultimately compromised. In our opinion the depositions of these witnesses are not admissible against Kishan Chand's representatives. Section 32, sub-clause (5), cannot apply because the dispute had arisen previously and also arose in that particular case. Section 33 is not applicable because the present defendants had no opportunity to cross-examine these witnesses.

There is a third ground on which also these depositions are not admissible. In their statements the witnesses, Kewal Kishan and Kundan, merely tried to prove the oral permission given by Brij Kishor to his wife and did not say a word as to the adoption of Rup Kishor. Their statements, therefore, did not relate to the existence of any relationship by adoption, inasmuch as they did not state that Rup Kishor was the adopted son of Musammat Durga Dei.

A question of law has been raised by the learned advocate for the appellant in respect of these three depositions. His contention is that section 32, sub-clause (5) becomes applicable when the statement was made before the question in issue was raised, which according to his contention means before the commencement of the present litigation. For this view he relies on the headnote in the case of *Mauladad Khan* v. *Abdul Sattar* (1), which says that the statement to be admissible must be

(1) (1917) 15 A.L.J., 349.

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before the litigation in the present case arose. That head-note, in our opinion, is misleading. The learned Judges in their judgement at page 358 had used a different language, namely, that the plaint contained a statement made before the question in dispute in the present suit was raised. The plaint which was referred to in that case had been filed before any dispute had arisen. The head-note of the same case, as reported in I.L.R., 39 Allahabad, 426, does not contain any such passage. The point, in our opinion, is concluded by the case decided by their Lordships of the Privy Council, viz. *Kalka Prasad* v. *Mathura Prasad* (1). In this case a dispute arose in 1896 on the death of Musammat Parbati. In 1898 in a suit brought by one Sheo Sahai a pedigree was filed. After this the suit, which went up in appeal to their Lordships of the Privy Council, was filed in 1901. At page 522 their Lordships held that the pedigree filed in 1898 was inadmissible, having been made *post litem motam*. We may also refer to another case decided by their Lordships of the Privy Council, *Bahadur Singh* v. *Mohar Singh* (2), where statements made in 1847 were held to be admissible on the ground that it did not appear that the heirship of the then claimants was really in dispute at that time. No such point could have arisen for consideration if the statements made prior to the suit before their Lordships were automatically admissible. We must, therefore, exclude from consideration the depositions of Musammat Durga Dei, Kewal Kishan and Kundan.

[The rest of the judgement is immaterial for the purpose of this report.]

Appeal dismissed.

(1) (1908) I.L.R., 30 All., 510. (2) (1901) I.L.R., 24 All., 91.

REVISIONAL CRIMINAL.

Before Mr. Justice Dalal.

EMPEROR *v.* KALI CHARAN SHARMA.*

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Criminal Procedure Code, sections 99A, 99B *and* 251—*Act No. XLV of* 1860 (*Indian Penal Code*), *section* 153A—*Proscription of book by Government—Application to set aside order of Government dismissed by High Court—Effect of order of High Court on trial of author of the proscribed book under section* 153A *of the Indian Penal Code—Act I of* 1872 (*Indian Evidence Act*), *sections* 11 *and* 13.

During a trial for an offence under section 153A of the Indian Penal Code, the offence being alleged to have been committed by means of a certain book written by the accused, and when twenty witnesses for the prosecution had been examined, the Local Government, by a notification under section 99A of the Code of Criminal Procedure, proscribed the book in question. The accused applied to the High Court, under section 99B of the Code, to set aside this order, and on this application a Bench of three Judges found that "the book contained matter which promoted, or was intended to promote feelings of enmity or hatred between different classes of His Majesty's subjects," and, therefore, dismissed the application. On this order being communicated to him, the trying magistrate at once closed the case, without recording any further evidence, and convicted the accused. The accused appealed to the Sessions Judge; but his appeal was dismissed.

Held, on an application to revise these orders, that the trying magistrate had no alternative, in the face of the decision of the High Court in the same matter, but to convict the accused, and, in these circumstances, was justified in disallowing all further evidence: The High Court therefore refused to interfere.

Held, further, that the decision of the High Court on the application under section 99B was relevant and admis-

*Criminal Revision No. 255 of 1927, from an order of E. Bennet, Sessions Judge of Agra, dated the 12th of March, 1927.

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sible in evidence under sections 11 and 13 of the Evidence Act.

THE facts of the case are fully set forth in the order of the Court.

Munshi *Narayan Prasad Ashthana*, Munshi *Panna Lal*, Munshi *Surendra Nath Varma* and Munshi *Parmeshri Sahai*, for the applicant.

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

DALAL, J. :—This is an application by Pandit Kali Charan Sharma, author of a Hindi book entitled "Vichitra Jiwan". He was convicted by the District Magistrate of Agra of an offence under section 153A of the Indian Penal Code, and his appeal was dismissed by the Sessions Judge of Agra. The sentence imposed on him is of one year's rigorous imprisonment and a fine of Rs. 1,000 or six months' further rigorous imprisonment in default. The ground of revision is that the District Magistrate shut out cross-examination of prosecution witnesses and the production of defence witnesses and therefore the trial, being in contravention of the mandatory provisions of section 251 of the Code of Criminal Procedure, was void, and the conviction passed on such a trial untenable.

It so happened that after the evidence of twenty prosecution witnesses had been recorded in September, 1926, the Local Government proscribed the book under section 99A, Criminal Procedure Code, on the 27th of October, 1926. The notification ran as follows :—

"In exercise of the powers conferred by section 99A of the Code of Criminal Procedure (No. V of 1898), as amended by Act No. XXXVI of 1926, the Governor in Council hereby declares to be forfeited to His Majesty all copies wherever found of the book in Hindi, or of its translation, entitled "Vichitra Jiwan" written by Pandit Kali Charan Sharma and published by Prem Pustakalaya, Phulatti Bazar,

Agra, and all other copies or editions of, or extracts from, the same book wherever printed, inasmuch as the said book, in the opinion of the Local Government, contains matter the publication of which is punishable under section 153A of the Indian Penal Code."

The Pandit, instead of facing out his trial, adopted the shorter course under section 99B of the Code of Criminal Procedure, as amended by Act No. XXXVI of 1926, which permitted any persons having any interest in a book, in respect of which an order of forfeiture had been made under section 99A, to apply to the High Court to set aside such order on the ground that the issue of the book in respect of which the order was made did not contain any matter which promoted, or was intended to promote, feelings of enmity or hatred between different classes of His Majesty's subjects. The meaning of the Hindi words " Vichitra Jiwan " is " a peculiar, topsy-turvy, or abnormal life." The very title suggests the life of a person who said one thing and did another, or did good or bad things at different times. In order to understand what effect a book of that nature, whose contents were rightly advertised by its title; would have on the minds of devout Muhammadans, it is sufficient to give the meaning of these words and to state that the life was that of the prophet Muhammad who is considered to be a holy personage by the Muhammadans. At the applicant's request the trial in the District Magistrate's court was stayed. The application under section 99B by the Pandit was heard here by a Bench of three Judges, WALSH, LINDSAY and BANERJI, JJ.* They definitely held, as they were bound to do in order to dismiss the application, that the book contained matter which promoted, or was intended to promote, feelings of enmity or hatred between different classes of His Majesty's subjects. The learned counsel who argued this revision showed me a copy of a judgement of a Judge of the

*Vide I.L.R., 49 All., 856.

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Lahore High Court on a similar book "Rangila Rasul" (a gay prophet) issued in the Punjab. Possibly the judgement was cited as both books appeared to have been issued in prosecution of the same Hindi propaganda. With all respect to the learned Judge, I am not prepared to agree with the nice distinction he has drawn between a book which may hurt the feelings of Muhammadans and a book which may cause feelings of enmity or hatred between different classes of His Majesty's subjects. Speaking for myself I look at such matter not as a somewhat learned Judge of a High Court, but as a common citizen of a town in India. I would place myself in the position of a Muhammadan who honours his prophet, and then consider what my feeling would be towards a Hindu who ridiculed that prophet, not out of any eccentricity (some *vichitra* mind), but in the prosecution of a propaganda started by a class of persons who are not Muhammadans. In such a position, from the hatred of an author I would, as an ordinary man, proceed to hatred of the class to which the author belonged and which instigated the author. There cannot be the slightest doubt that writing such as that of the book before me, which I am not going to analyse for fear of giving it further publicity, will certainly promote feelings of enmity and hatred between Hindus and Muhammadans.

The matter, however, does not rest there. The question is whether the applicant had a fair trial. I do not agree with the learned Judge of the lower court who held that the judgement of this Court, solemnly delivered by three learned Judges who had the same issue before them as the learned Sessions Judge, a presiding officer of an inferior court, had, was irrelevant. Under section 11 of the Evidence Act facts not otherwise relevant are relevant if they are inconsistent with any facts in issue or relevant fact. The fact in issue here is whether the writing comes within the purview of section

153A of the Indian Penal Code, and the defence to it is inconsistent with the dismissal of the petition of the applicant by this Court. Under section 13 also the judgement of this Court may be admissible. The applicant claimed the right to distribute his books, and that right was denied by this Court on the ground that the book contained matter which promoted hatred between Hindus and Muhammadans.

Upon a closer examination, we must inquire whether the District Magistrate should go through the farce of recording evidence under a mandatory provision of the Code of Criminal Procedure when he knows well that no Magistrate, Sessions Judge, or a Judge of the High Court can hold on the matter in issue in the trial before him contrary to the definite opinion of a Bench of three Judges of this Court. In my opinion, even in cases of mandatory provisions, their application must vary according to the circumstances of the case. When section 251 was re-codified in 1898 the framers thereof had not in mind the subsequent provisions of sections 99A, B, C, D, E, F and G, which were first enacted in 1922 by the Press Law Repeal and Amendment Act (No. XIV of 1922), and subsequently extended in operation by Act No. XXXVI of 1926. Would it have been possible for any Magistrate to convict the Pandit of the offence of which he has been convicted, if the Bench of this Court had granted his application under section 99B and set aside the Local Government's order of forfeiture, dated the 27th of October, 1926? I am certain that no conviction would have been possible. When his application was dismissed, he must suffer the penalty. Two courses were open to him, either the quick one under section 99B, or the slow and spectacular one of trial before the District Magistrate with lengthy cross-examination and a crowd of defence witnesses. He chose the shorter cut,

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and, in my opinion, the District Magistrate was perfectly correct in shutting out all further evidence after the order of a Bench was passed here. The applicant had had a definite finding against him of the highest Court in the province presided over by three Judges, two of them being the most senior puisne Judges of this Court. Whatever the evidence may be on either side, no court in this province would be able to decide otherwise, and, therefore, in my opinion, all further evidence was rightly disallowed by the District Magistrate. It is true that the provisions of section 251 of the Code of Criminal Procedure have been violated, but I have explained the necessity of such violation by amendments in the Code which were subsequent to the codification of section 251.

There is a heavy sentence of fine, and the Local Government did not take prompt action. Whatever mischief the book was likely to do has been done. Under the circumstances I think there should be a substantial reduction in the sentence of imprisonment. I reduce the sentence of one year's rigorous imprisonment to one of two months' rigorous imprisonment, but uphold the sentence of fine of Rs. 1,000 and the rigorous imprisonment for six months in default; otherwise the application is dismissed.

Application dismissed.

Sentence reduced.

APPELLATE CIVIL.

Before Mr. Justice Ashworth and Mr. Justice Iqbal Ahmad.

BINDESHRI UPADHIYA AND OTHERS (PLAINTIFFS) *v.* SITAL UPADHIYA AND OTHERS (DEFENDANTS)* 1927 *May*, 25

Act No. IX of 1908 (*Indian Limitation Act*), *articles* 120 *and* 126—*Joint Hindu family—Remedies of son against alienation of family property by father—Limitation.*

Article 126 of the Indian Limitation Act, 1908, is based upon the principle that a son's knowledge of alienation by his father ordinarily arises when he sees the alienee in possession. In cases where the alienee never gets possession, no limitation can arise under article 126. In such cases the right of the son will amount merely to obtaining a declaration that the deed is invalid and the limitation prescribed for such a suit is that provided for by article 120.

Held, therefore, that article 126 does not apply to a suit by Hindu sons to set aside a mortgage made by the father in favour of persons who were already in possession under a previous mortgage. *Munia Goundan* v. *Ramasami Chetty* (1) referred to.

THE facts of the case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Pandit *Ambika Prasad Pande*, for the appellants.

Pandit *Uma Shankar Bajpai*, for the respondents.

ASHWORTH and IQBAL AHMAD, JJ. :—This second appeal arises out of a suit brought by the plaintiffs for a declaration that a certain mortgage-deed executed on the 22nd of May, 1915, by their father, the defendant No. 1, in favour of defendants Nos. 2 and 3 is invalid on the ground that their father executed the deed without legal necessity and that the property being an occupancy holding could not be transferred under the provisions of the

Second Appeal No. 1085 of 1925, from a decree of Ali Ausat, District Judge of Ghazipur, dated the 28th of February, 1925, reversing a decree of Raja Ram, Additional Subordinate Judge of Ballia, dated the 28th of March, 1924.

(1) (1918) I.L.R., 41 Mad., 650.

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Tenacy Act. Amongst other pleas the defendants took up the plea that the suit was barred by limitation. The trial court applied article 126 of the Limitation Act and found that the suit was maintainable as it was brought within 12 years of the date of the alienation impugned. In first appeal the District Judge held that article 126 of the Limitation Act was not applicable inasmuch as the plaintiffs were not asking for possession but only for declaration. It has been explained to us that the plaintiffs could not ask for possession inasmuch as, even if the deed in suit be set aside, the defendants are in possession under previous mortgages.

The sole point argued before us in this appeal is that the lower appellate court was wrong in refusing to apply article 126. It is argued that article 126 will apply even though the father's alienee does not get possession of the mortgaged property in cases where the interest actually mortgaged was not capable of physical possession. We are unable to accept this proposition. It is sufficient, in our opinion, to refer to the decision in *Munia Goundan* v. *Ramasami Chetty* (1). Article 126 is doubtless based upon the principle that a son's knowledge of alienation by his father ordinarily arises when he sees the alienee in possession. In cases where the alienee never gets possession, no limitation can arise under article 126. In such cases the right of the son will amount merely to obtaining a declaration that the deed is invalid. The limitation prescribed for such a suit is article 120, namely, six years. In this case six years having elapsed from the date of the alienation impugned, the suit was rightly held by the lower appellate court to be time-barred. For these reasons, we dismiss this appeal with costs.

Appeal dismissed.

(1) (1918) I.L.R., 41 Mad., 650.

Before Mr. Justice Ashworth and Mr. Justice Iqbal Ahmad.

GANGA CHARAN AND OTHERS (DEFENDANTS) *v.* RAM CHANDRA (PLAINTIFF).*

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May, 25.

Civil Procedure Code, section 92—Religious endowment—Suit by alleged trustee against a person asserted to be a trespasser—Devolution of right to appoint trustee.

Section 92 of the Code of Civil Procedure has reference to those cases alone where there is an allegation of breach of some express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the court is deemed necessary for the administration of any such trust.

It has no application to suits where a plaintiff claims possession of the endowed property on the allegation that he is the duly appointed trustee and that the defendant is a trespasser. *Inayat Husain* v. *Faiz Muhammad* (1), *Muhammad Abdul Majid Khan* v. *Ahmad Said Khan* (2), *Puttu Lal* v. *Daya Nand* (3) and *Nilkanth Devrao* v. *Ramkrishna Vithal* (4), referred to.

In the absence of a provision in the deed prescribing the mode of devolution to the office of *shebait* of a temple, and in the absence of a custom to the contrary, the power to appoint a successor to a *shebait* reverts to the heirs of the founder of the trust, and a *shebait* has no right to appoint a successor to himself. *Chandranath Chakrabarti* v. *Jadavendra Chakrabarti* (5), *Sheo Prasad* v. *Aya Ram* (6) and *Sheoratan Kunwari* v. *Ram Pargash* (7), followed.

THE facts of this case sufficiently appear from the judgement of the Court.

Pandit *Uma Shankar Bajpai*, for the appellants.

Dr. *Kailas Nath Katju*, for the respondent.

*Second Appeal No. 1066 of 1925, from a decree of Aghor Nath Mukerji, Additional Judge of Bareilly, dated the 16th of February, 1925, reversing a decree of C. Deb Banerji, Additional Subordinate Judge of Bareilly, dated the 12th of February, 1924.

(1) (1923) I.L.R., 45 All., 335. (2) (1913) I.L.R., 35 All., 459.
(3) (1922) I.L.R., 44 All., 721. (4) (1921) I.L.R., 46 Bom., 101.
(5) (1906) I.L.R., 28 All., 689. (6) (1907) I.L.R., 29 All., 663.
(7) (1896) I.L.R., 18 All., 227.

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GANGA CHARAN v. RAM CHANDRA.

ASHWORTH and IQBAL AHMAD, JJ. :—This is a defendants' appeal and arises out of a suit for possession of certain property that was dedicated to a certain deity by one Pandit Manni Ram by a deed of endowment, dated the 10th of January, 1899. By that deed Manni Ram appointed himself and one Gulab Shankar as *sarbarakars* of the endowed property. Manni Ram died in or about the year 1900 and Gulab Shankar alone continued to act as *sarbarakar* of the endowed property.

By a deed, styled as a deed of gift, dated the 17th of December, 1912, Gulab Shankar appointed the defendant appellant as trustee and manager in his place. About three months prior to the institution of the suit giving rise to the present appeal Gulab Shankar died. Udho Ram, the heir of Manni Ram, on the 15th of December, 1922, executed a document in favour of the plaintiff by which he appointed the plaintiff as trustee and *sarbarakar* of the endowed property.

The plaintiff's case was that Gulab Shankar had no right to nominate a successor of his own, or to appoint a trustee of the endowed property, and that, notwithstanding the execution of the deed of gift of 1912, Gulab Shankar continued to act as *sarbarakar* till the date of his death and that after Gulab Shankar's death the right to appoint a *sarbarakar* and trustee of the endowed property vested in the heirs of the founder of the trust. The plaintiff maintained that the defendant was in possession of the endowed property as a trespasser and accordingly claimed the relief referred to above.

The suit was contested by the defendant on various grounds, but, as only two points have been argued in the present appeal, we need not notice the points other than those argued before us. It was contended by the defendant that the suit was barred by section 92 of the Code

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of Civil Procedure and that Gulab Shankar was competent to appoint the defendant as *sarbarakar* and trustee and that the defendant appellant was rightfully in possession of the endowed property.

Both the courts below overruled the plea based on section 92 of the Code of Civil Procedure. The trial court accepted the other contention advanced on behalf of the defendant mentioned above and accordingly dismissed the plaintiff's suit. The lower appellate court came to the conclusion that the defendant Gulab Shankar had no right in preference to the heirs of the founder of the trust to appoint a successor of his own and that the defendant had not been validly appointed and the plaintiff was a duly appointed trustee and was entitled to the relief sought.

In our judgement the decision of the lower appellate court is perfectly correct and ought to be affirmed. It is well settled that section 92 of the Code of Civil Procedure has no application to suits where a plaintiff claims possession of the endowed property on the allegation that he is the duly appointed trustee and that the defendant is a trespasser; vide *Inayat Husain* v. *Faiz Muhammad* (1) and *Muhammad Abdul Majid Khan* v. *Ahmad Said Khan* (2). It has also been decided by this Court in the case of *Puttu Lal* v. *Daya Nand* (3) that section 92 of the Code of Civil Procedure does not apply to a suit between persons who individually claim a right to succeed to the office of trustee. In view of these authorities it is impossible to hold that the present suit was a suit of the nature contemplated by section 92 of the Code of Civil Procedure. It is to be noted that section 92 has reference to those cases, and to those cases alone, where there is an allegation of breach of any express or constructive trust created for public purposes of a charitable

(1) (1923) I.L.R., 45 All., 335. (2) (1913) I.L.R., 35 All., 459.
(3) (1922) I.L.R., 44 All., 721.

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or religious nature, or where the direction of the court is deemed necessary for the administration of any such trust. In the present case there was no allegation of any breach of the trust nor was it alleged that the direction of the court was necessary for the administration of the trust, and in the absence of any such allegation section 92 of the Code of Civil Procedure could not apply. The view that we take is in consonance with the view taken in the case of *Nilkanth Devrao* v. *Ramkrishna Vithal* (1). We accordingly agree with the courts below in holding that section 92 was not a bar to the suit.

In our judgement there is no substance in the second point, either, argued by the learned counsel for the appellant. We are in the present case dealing with a temple as distinguished from a *math*. In the case of a temple the endowed properties are deemed vested in the presiding god treated as a juristic person, the management being vested in a trustee. The manager or trustee of a temple is designated as a *shebait*.

"The devolution of the office of *shebait* depends primarily on the terms of the deed by which the trust is created. In the absence of any provision in the deed as to the devolution of the office of *shebait*, the title to the property or to the management and control of the dedicated property, as the case may be, *follows the line of inheritance from the founder;* in other words, it passes to his heirs unless there has been some usage or course of dealing which points to a different mode of devolution, e.g., devolution on a single heir." *Vide* Mulla's Principles of Hindu Law, 5th edition, page 408 and the cases cited therein.

As already stated, in the absence of a provision in the deed prescribing the mode of devolution to the office of *shebait*, and in the absence of a custom to the contrary, the power to appoint a successor to a *shebait* reverts to the heirs of the founder

(1) (1921) I.L.R., 46 Bom., 101.

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of the trust and a *shebait* has no right to appoint a successor to himself: *Vide* the cases of *Chandra Nath Chakravarti* v. *Jadabendra Chakravarti* (1), *Sheo Prasad* v. *Aya Ram* (2) and *Sheoratan Kunwari* v. *Ram Pargash* (3). In the present case it has been held by both the courts below that Udho Ram is the heir of Manni Ram, the founder of the trust. Therefore the appointment of the plaintiff by Udho Ram as a *shebait* is a valid appointment and the plaintiff has a right to enter into possession of the endowed property as a trustee. The defendant has not a shadow of title to remain in possession and the decree passed against him is perfectly correct. The remaining grounds taken in the memorandum of appeal have not been pressed. Accordingly we dismiss the appeal with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Dalal.

EMPEROR *v.* MURLI PATHAK.*

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May, 25.

Criminal Procedure Code, section 342—Extent of protection given to an accused in the matter of statements made by him when being examined by the court.

An accused person being examined by the court under section 342 of the Code of Criminal Procedure was asked why the charge had been brought against him, and he replied that it was through enmity on the part of the complainant. He was then asked if he had anything further to say, and he proceeded to give reasons for the alleged enmity, in the course of which he falsely made defamatory statements against the complainant.

*Criminal Revision No. 270 of 1927, from an order of Govind Sarup Mathur, Sessions Judge of Mirzapur, dated the 12th of March, 1927.

(1) (1906) I.L.R., 28 All., 689. (2) (1907) I.L.R., 29 All., 663.
(3) (1896) I.L.R., 18 All., 227.

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Held, that the accused was exempt from prosecution in connection with the statement so made by reason of section 342(2) of the Code. *Champa Devi* v. *Pirbhu Lal* (1), *Bai Shanta* v. *Umrao Amir Malik* (2), *In re Venkata Reddy* (3) and *Satish Chandra Chakravarti* v. *Ram Doyal* (4), referred to.

THE facts of this case sufficiently appear from the judgement of the Court.

Maulvi *Muhammad Abdul Aziz*, for the applicant.

Munshi *Gadadhar Prasad*, for the opposite party.

DALAL, J. :—The only ground worth considering in this application for revision is ground No. 3, that the alleged defamatory statement, having been made by the applicant as an accused person in his defence, cannot form the subject-matter of a prosecution for defamation. The applicant Murli Pathak was prosecuted by Bhukkal on a charge under section 426 of the Indian Penal Code. In the ordinary course, during the trial, the applicant Murli Pathak was examined by the court under section 342 of the Code of Criminal Procedure. Questions were put to him by the court, and he answered them. At the end, one question was why the charge was brought against him by Bhukkal, and he replied that this was owing to enmity. The next question was whether he had anything more to say, and in answer he gave a reason for the enmity. His answer was that he and Bhukkal were not on dining terms because Bhukkal's daughter-in-law was in the keeping of a *Lohar*. Bhukkal thereupon prosecuted Murli Pathak under section 499, Indian Penal Code, for defamation, and Murli was punished by a Magistrate with a fine under section 500, Indian Penal Code. An appeal by Murli was dismissed, and he has brought this revision application to this Court.

In my opinion the provisions of section 342 (2) of the Code of Criminal Procedure will apply. It is laid

(1) (1925) 24 A.L.J., 329. (2) (1925) I.L.R., 50 Bom., 162.
(3) (1912) I.L.R., 36 Mad., 216. (4) (1920) I.L.R., 48 Calc., 388.

down there that the accused shall not render himself liable to punishment by refusing to answer such questions—that is, those put to him by the court under clause (1)—or by giving false answers to them. Murli, who was an accused person in the case under section 426, is now punished for giving a false answer to a question by the court. In my opinion the order was prohibited by statute. On behalf of Bhukkal complainant my attention was drawn to the judgement of Mr. Justice DANIELS in *Champa Devi* v. *Pirbhu Lal* (1). In that case the accused person who was prosecuted for defamation had filed a written statement, and the learned Judge has specifically mentioned that the immunity conferred by section 342(2) of the Code of Criminal Procedure did not extend to a written statement. The learned counsel next referred me to a Full Bench decision of the Bombay High Court, *Bai Shanta* v. *Umrao Amir Malik* (2). The question referred to the Full Bench was whether relevant statements made by an accused person under section 342 of the Code of Criminal Procedure, or contained in a written statement filed by him with the court's permission, are absolutely protected from being the subject of a prosecution for defamation under section 500, Indian Penal Code. The answer to this was in the negative. With all respect it may be pointed out that the question includes two different matters, one privileged under section 342 (2) and the other (a written statement) not so privileged. The learned CHIEF JUSTICE while delivering the judgement of the Full Bench, observed :—

"There is nothing in section 342 of the Code of Criminal Procedure which gives an accused person an absolute privilege as regards defamatory statements made by him in his examination."

However the matter may be put, there is no explanation of the provisions of clause (2) of section 342,

(1) (1925) 24 A.L.J., 329. (2) (1925) I.L.R., 50 Bom., 162.

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and even if the accused did not have any absolute privilege, it will be sufficient for his purpose if he cannot be punished for making a false statement in answer to a question put to him by the court. When he cannot be punished, it must be presumed that he had an absolute privilege under Section 342(2) of the Criminal Procedure Code. There is no consideration given to this matter by the learned Judges of the Bombay High Court. The Madras High Court is in favour of absolute privilege, see *In re Venkata Reddy* (1); while the Calcutta High Court has disagreed with this opinion: *Satish Chandra Chakravarti* v. *Ram Dayal De* (2). The question which arises here is not of absolute privilege, but of the bar to the accused being punished for anything he may state in answer to questions by the court.

It was argued that the answer containing the defamatory statement was wholly irrelevant and added by Murli Pathak, not in answer to any question, but of his own motion, to defame Bhukkal. I cannot agree to that view of the circumstances of the examination. Murli was asked the reason for a false charge, and when he gave that to be enmity, and when the court proceeded to direct him to make any further statement, the natural implication was that the court desired to know the reason for the enmity, and the defamatory statement did give that reason. The answer which is the subject of the defamation was relevant to the matter in issue and arose out of a question put by the court. I hold that Murli was saved from punishment by the protection given to him under section 342 (2) of the Code of Criminal Procedure when he made the defamatory statement.

I set aside the conviction and sentence and order the fine, if any recovered, to be refunded.

Conviction quashed.

(1) (1912) I.L.R., 36 Mad., 216. (2) (1920) I.L.R., 48 Calc., 388.

MISCELLANEOUS CIVIL.

Before Justice Sir Cecil Walsh.

BANK OF UPPER INDIA, LIMITED, (IN LIQUIDATION) v. FANNY SKINNER ALIAS NASIRA BEGAM AND OTHERS.* 1927 *May*, 27.

Act No. VII of 1913 *(Indian Companies Act), sections* 179 *and* 215—*Liquidator—Civil Procedure Code, order XXI, rule* 72—*Sales in execution of decrees in favour of the company in liquidation—Jurisdiction to grant permission to the liquidator to bid.*

The Judge in winding up has no jurisdiction to make an order giving a liquidator permission to bid at sales held in execution of mortgage decrees passed in favour of a company in liquidation. Such jurisdiction is vested under the Code in the execution court.

On the other hand, under sections 179 and 215 of the Companies Act, a Judge of the High Court exercising winding up jurisdiction can sanction any reasonable step which the liquidator may desire to take in the interest of the winding up, in which the primary concern is the interest of the creditors and the share-holders, and therefore has power to sanction his applying to the execution court, either in a particular case or generally in all cases in which he thinks it desirable, for leave to bid as a decree-holder under order XXI, rule 72 of the Code of Civil Procedure.

THIS was an application made by the liquidator of the Bank of Upper India, Ltd., Meerut. The facts of the case are fully stated in the order of the Court.

Munshi *Ram Nama Prasad*, for the applicant.

WALSH, J. :—This is an application by the sole liquidator of the Bank of Upper India asking me, as the Judge in winding up, to issue an order sanctioning the liquidator bidding for all properties which may be put up for sale at any future time, under execution proceedings taken for the sale of properties under mortgage decrees which the liquidator may obtain on mortgages given

*Miscellaneous Case No. 300 of 1927.

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to the Bank now in liquidation, and also asking for sanction to bid in the case of those properties which have already been put up for sale, and in which the sales have been set aside and the properties have to be put up for sale again. In the first place, I am asked to issue notice to all whom it may concern. Who is meant by that very general phrase I have not the slightest idea, nor has the learned counsel making the application. He suggests that I should issue notice to all alleged mortgagors, who may be parties to pending suits in which decrees for sale may possibly be granted, or who may hereafter become parties to suits brought by the liquidator as mortgagee. I am certainly not going to do anything of the kind. I have never heard before of a roving notice to a large class of persons, who are not parties at all, merely on some hypothetical contingency, which may or may not become a question of practical importance. In the second place I am of opinion that I have no jurisdiction to make any order giving the liquidator leave to bid. I can, of course, give any direction to him to take such legal steps as he desires to take, in accordance with the general provisions of the law, in a matter in which he is a litigant like any other ordinary litigant, but the granting or refusing of permission to bid at a sale is clearly a matter for the execution court. Rule 72 of order XXI of the Code of Civil Procedure provides, as originally enacted, "that no holder of a decree in execution of which property is sold, shall, without the express permission of the court, bid for or purchase the property." But these rules in schedule I are subject to the respective High Courts' powers of amendment, and in these Provinces sub-rule (1) of rule 72 no longer exists. Permission is not necessary to a decree-holder in these provinces, but as the execution court in which this question has been raised is not in these Provinces, this point is not very material. What the state

of this rule may be in the Punjab, I do not know, because I have no information as to what amendments have been made in the first schedule in the Punjab; but a little reflection will show that the matter must be solely in the jurisdiction of, and governed by, the execution court, which is seised of the matter. In the first place a liquidator who becomes a litigant, either as plaintiff in a mortgage suit to enforce a mortgage, or in any other capacity, while he still remains a liquidator and an officer of the court of companies winding up, becomes in his capacity as party to the suit an ordinary litigant. In the case said to be pending in appeal in the Punjab High Court, he is a mere decree-holder, with rights and obligations no different from those of an ordinary litigant who is a decree-holder, and therefore order XXI, rule 72, applies to him, and the execution court can give or refuse permission to him to bid at a sale, if the original form of the rule is in force and permission is necessary to a decree-holder. It would be a strange thing if, in a simple administrative matter like permission to bid at a sale, there should be two courts with concurrent jurisdiction to give or withhold permission, and it certainly would be extremely embarrassing, and it is unlikely that the legislature ever intended any such contingency, that a court in one Province may give permission while in another Province the execution court may refuse it, or *vice versa*. I understand that, whereas the execution court in the matter now pending gave permission, a Subordinate Judge in a declaratory suit has held that the sale is null and void, because the decree-holder who got the permission was a liquidator. With all respect it seems to me that that consideration is totally irrelevant. It does not matter who the decree-holder is, and it does not matter, for the purpose of the validity of the sale, whether the liquidator has, or has not, approached the court exercising winding up jurisdiction.

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If the liquidator has done as a liquidator anything improper, that is a matter between him as an officer of the winding up court and the Judge in winding up, and has no bearing upon his rights as a litigant and decree-holder, and if considerations of this kind have operated upon the mind of the court in setting the sale aside, it seems to me that it is a matter which demands the reconsideration of an appellate court. I mention this matter because it is made the foundation of this application by the liquidator. The liquidator reasonably appeals to this Court for assistance because he says that although he obtained permission to bid from the execution court, it has been held that because he is a liquidator the sale is invalid, and that therefore he is liable, so often as he obtains permission and successfully bids and purchases the property, to have the sale set aside by a constant succession of declaratory decrees. He has, therefore, asked me to give him a general authority to bid, hoping that this will cure the defect. To my mind it will do nothing of the kind. His right to bid or not to bid must be adjudicated upon as any other decree-holder's right is adjudicated upon, under order XXI, rule 72, and cannot be affected by anything which I can say or do. In order to prevent, if possible, the embarrassment and misfortune of conflicting decisions, I venture to suggest that it might be as well if the liquidator, in the hearing of the appeal before the Punjab High Court, applied to the High Court for permission to report what has happened to the matter in this Court and to read this order holding definitely, as I do, that I have no jurisdiction and that the jurisdiction is vested under the Code in the execution court.

On the other hand I have jurisdiction, under sections 179 and 215 of the Companies Act, to sanction any reasonable step which the liquidator may desire to take

in the interests of the winding up, in which of course the primary concern is the interest of the creditors and the share-holders, and therefore I have power to sanction his applying to the execution court either in a particular case or generally in all cases in which he thinks it desirable, for leave to bid as a decree-holder under order XXI, rule 72. It is clearly covered by clause (*a*) of section 179, which deals with the institution of any suit in the name of a company, and clause (*b*), which deals with the carrying on of the business of the company so far as it may be necessary for the winding up. In the application before me the liquidator makes out a very strong case. In the particular instances in which difficulty has arisen the properties are hotels. Everybody knows that in India, at any rate, hotel property, particularly outside the large capitals, is a very special class of property, and the business or goodwill of a hotel is not one which readily finds a market among the general public; and inasmuch as the liquidator, having been in possession of some of these properties and having had the business under his control, has derived experience therefrom, and is not only a likely buyer but probably one of the most, if not the most, likely buyer, it seems to me essential, for the satisfactory conduct of the winding up, that he should take every possible step to realize the assets, and if the asset is one like a hotel, which may become unsaleable unless he is able to purchase it himself, he ought, in the interests of the shareholders and creditors, to do his best to purchase it, and to do so at a reasonable figure, and as a means to that end, to apply to the execution court as a decree-holder for permission to bid. The reasons seem to me to be overwhelming, and as a Judge in the winding up I sanction his making the necessary application from time to time as a decree-holder for permission from the execution court to bid at any such sales, leaving it in his dis-

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cretion not to do so if he is satisfied that no benefit would accrue.

I ought to mention one other matter. Inasmuch as I am only acting in winding up for a short time in the absence of Mr. Justice MUKERJI, and inasmuch as this application has already been before him and has been adjourned from time to time at the request of the parties apparently pending the decision of the Punjab High Court, I think it right to mention that in his absence and without the opportunity of consulting him, I thought it right not to delay the matter further by another adjournment, but to give the necessary direction to the liquidator without delay, so that he may take such steps as he considers right with regard to future sales, and, if the High Court of Lahore during the hearing of the appeal permits, to mention to the High Court what has been done in the winding up court. The matter seems to me one of urgency, and I have, therefore, dealt with it today in order to put the liquidator in a position to do what is right in the matter.

APPELLATE CIVIL.

Before Mr. Justice Sulaiman and Mr. Justice Banerji.

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May, 27.

BOHRA SRI RAM (PLAINTIFF) v. JWALA SHANKAR SAHAI AND OTHERS (DEFENDANTS).*

Act (Local) No. XI of 1922 *(Agra Pre-emption Act), sections* 1 *and* 3*—Pre-emption—Customary right of pre-emption within a municipal area.*

Inasmuch as any area included within the limits of a municipality is expressly excluded from the operation of the Agra Pre-emption Act, 1922, it follows that a custom of pre-emption prevailing in such area remains unaffected.

*Second Appeal No. 434 of 1926, from a decree of Raj Rajeshwar Sahai, Third Additional Subordinate Judge of Aligarh, dated the 1st of December, 1925, reversing a decree of Jagannath Singh, Munsif of Jalesar, dated the 25th of July, 1925.

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BOHRA SRI RAM v. JWALA SHANKAR SAHAI.

THE facts of this case sufficiently appear from the judgement of the Court.

Munshi *Girdhari Lal Agarwala* and Babu *J. S. Gupta*, for the appellant.

Babu *Piari Lal Banerji*, for the respondents.

SULAIMAN and BANERJI, JJ. :—This is a plaintiff's appeal arising out of a suit for pre-emption of property situated within the municipal limits of the town of Jalesar. There were many points in dispute, and one of the points was whether in view of the passing of the Agra Pre-emption Act the suit was not maintainable. The court of first instance in a clear judgement held that the Agra Pre-emption Act was not applicable to the suit and the case was governed by the old law. It then proceeded to consider the other issues and ultimately passed a decree in favour of the plaintiff. The lower appellate court has reversed that decree on the sole finding that under the Agra Pre-emption Act all other rights of pre-emption have been abrogated.

We are of opinion that the lower appellate court has erred in this conclusion. Section 1, sub-clause (3), of the Act clearly provides that it does not apply to any area included within the limits of a municipality, cantonment, notified area, or town area. Then section 3 provides that no right of pre-emption shall be enforced in respect of a transfer made after the commencement of this Act of an interest *in relation to any area to which this Act applies*, except in accordance with the provisions of this Act. It then proceeds to make a special exception in favour of the Muhammadan law. On the wording of these two sections it is quite clear that the customary right of pre-emption has been abolished only in areas to which this Act applies. Section 3 contains no other prohibition. It is not wide enough to abolish pre-emption even in areas to which the Act does not apply.

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Section 1, sub-clause (3), clearly makes the Act inapplicable to a municipality. In our opinion it follows that the Act has not abolished a customary right of pre-emption within a municipal area to which the Act is not applicable. The present case must, therefore, be governed by any custom that may prevail in the town.

We accordingly allow this appeal and, setting aside the decree of the lower appellate court, send the case back to that court for disposal of the remaining points in dispute. The plaintiff appellant will have his costs of this appeal from the defendants respondents.

Appeal allowed.

Before Mr. Justice Ashworth and Mr. Justice Iqbal Ahmad.

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June, 2.

BETI AND ANOTHER (PLAINTIFFS) *v.* SIKHDAR SINGH AND OTHERS (DEFENDANTS).*

Hindu law—Joint Hindu family—Separation—Ascertainment of shares of members not conclusive evidence of separation—Second appeal—"Question of law".

A mere ascertainment of shares of the members of a joint family is not conclusive evidence of separation, but the burden of proving that, notwithstanding the ascertainment of shares of the various members of the family, the family continued to be a joint family lies on the person making the assertion. *Palani Ammal* v. *Muthuvenkatachala Moniagar* (1), referred to.

"The proper effect of a proved fact is a question of law." *Dhanna Mal* v. *Moti Sagar* (2), followed.

THE facts of this case are fully stated in the judgement of the Court.

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*Second Appeal No. 1172 of 1925, from a decree of K. G. Banerji, Additional Judge of Shahjahanpur, dated the 2nd of March, 1925, confirming a decree of Tufail Ahmad, Subordinate Judge of Shahjahanpur, dated the 31st of March, 1924.

(1) (1924) I.L.R., 48 Mad., 254. (2) (1927) I.L.R., 8 Lahore, 573.

Pandit *Uma Shankar Bajpai* and Munshi *Harnandan Prasad*, for the appellants.

Munshi *Narain Prasad Ashthana*, for the respondents.

ASHWORTH and IQBAL AHMAD, JJ.—This is a plaintiffs' appeal and arises out of a suit for possession of certain property.

The plaintiffs are the daughters of one Madho Singh, and their case was that Madho Singh was the sole owner of the property in dispute and died as a separated Hindu in 1888 and on his death his widow, the mother of the plaintiffs, became entitled to the property in dispute by right of inheritance, but the ancestors of the defendants, who were the collaterals of Madho Singh, by exercising undue influence on the mother of the plaintiffs, persuaded her to enter into a compromise, by virtue of which she surrendered possession of the property in dispute to those collaterals on being allowed to remain in possession of the *sir* land appertaining to the *zamindari* share that belonged to Madho Singh. The plaintiffs impugned the validity of the compromise and maintained that that compromise was ineffectual to adversely affect their rights to the property in dispute that came into existence on the death of their mother.

The defence to the suit was that the family of Madho Singh and of his uncles Ram Bakhsh Singh and Bhawani Singh was a joint Hindu family, and the property in dispute along with other properties was the joint property of that family, and on Madho Singh's death the property in dispute passed by right of survivorship to the surviving members of that family. The allegation of the plaintiffs as regards the exercise of undue influence by the then collaterals of Madho Singh was also denied by the defendants. The finding of both the

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courts below on this point is in favour of the defendants, and that finding must be accepted in second appeal.

The main question that called for determination in the case was whether or not Madho Singh died as a separated Hindu and was the sole owner of the property in dispute. If he was separate from the other members of his uncle's family, and if he was the sole owner of the property in dispute, the plaintiffs undoubtedly were entitled to a decree for possession as against the defendants, as the right of the plaintiffs to get possession of the property in dispute accrued on the death of the widow of Madho Singh and it is common ground that she died within a couple of years prior to the institution of the suit. On the other hand, if Madho Singh was a member of a joint Hindu family along with the descendants of Ram Bakhsh Singh and Bhawani Singh, the property in dispute would pass to the surviving members of that family by right of survivorship.

Both parties adduced oral and documentary evidence in support of their respective allegations. The oral evidence has been rejected by both the courts below and, in our judgement, has been rightly rejected. As has been pointed out by the lower appellate court, it is difficult to get reliable evidence as regards the events that took place in or about the year 1888 at this distance of time, and, therefore, it is unsafe to come to a finding on a point of separation or jointness on the basis of oral evidence.

There then remained for consideration the documentary evidence produced by the parties. The trial court noticed some of the documents relied upon by the parties and came to the conclusion that the plaintiffs failed to prove that Madho Singh had died as a separated Hindu. The lower appellate court did not notice all the documentary evidence referred to by the trial court in its

judgement. It referred to a certain litigation that took place in 1870 between the two sons of Bhawani Singh, who, as already stated, was the uncle of Madho Singh. The lower appellate court dismissed that litigation from consideration by the following observation :—"This took place in 1870. Beyond specifying the shares the litigation did not proceed further." This shows that the lower appellate court was of opinion that the mere fact of the institution of a suit for possession and for mesne profits of a definite share of property by one member of a joint Hindu family against another has not the effect of causing a disruption of that family. The lower appellate court was wrong in making this assumption. If one of the sons of Bhawani Singh sued his brother for a specific share of the property owned by Bhawani Singh and if he got a decree, and if after getting that decree he got into separate possession of the share decreed to him, it is impossible to hold that he and his brother after that litigation continued to live jointly. Further, if there was separation between the two brothers, the presumption, in the absence of proof to the contrary, would be that there was, in the eyes of the law, a separation of the entire family, and the share of each member of the family became an ascertained share. If there is an ascertainment of shares of the members of a joint Hindu family the presumption, in the absence of proof to the contrary, is that the family became divided. In other words, the ascertainment of shares of the various members of the family is presumptive evidence of separation, but the presumption is one capable of being rebutted by evidence showing that, notwithstanding the ascertainment of the shares, the members continued to live jointly, or by their subsequent conduct exhibited an intention to continue to live as members of a joint family. As was pointed out by their Lordships of the Privy Council in the case of

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Palani Ammal v. *Muthuvenkatachala Moniagar* (1), "the mere fact that the shares of the co-parceners had been ascertained does not by itself necessarily lead to an inference that a joint family had separated. There may be reasons other than a contemplated immediate separation for ascertaining what the shares of co-parceners on a separation would be." It is clear from this observation of their Lordships of the Privy Council that a mere ascertainment of shares of the members of a joint family is not conclusive evidence of separation, but the burden of proving that, notwithstanding the ascertainment of shares of the various members of the family, the family continued to be a joint family lies on the person making the assertion. The learned Judge of the lower appellate court was of opinion that unless the plaintiffs succeeded in proving that something further than a mere ascertainment of shares took place in consequence of the litigation of 1870, the presumption of the continuance of the joint family must hold the field. In so holding the lower appellate court, as already observed, misdirected itself on a question of law and it appears that in consequence of this erroneous assumption it did not proceed to review the entire documentary evidence tendered by the parties in the case.

The lower appellate court further referred to two mortgage-deeds of the years 1879 and 1882. One mortgage-deed was executed by Madho Singh and the other by Chittan Singh. Those deeds were relied upon by the plaintiffs to show separate dealings by the members of the alleged joint family. The lower appellate court brushed aside those documents with the observation that "there is nothing to show that the mortgages were enforced." In our judgement the lower appellate court was wrong in rejecting evidence afforded by those documents simply on the ground that the plaintiffs had not

(1) (1924) I.L.R., 48 Mad., 254.

shown that those mortgages were put into suit. No doubt if those mortgage-deeds had been enforced they would be very reliable evidence of separation, but it cannot be said that the mere fact that they were not enforced deprives them of all their evidentiary value. In view of these misdirections by the lower appellate court we cannot accept the finding of the lower appellate court as a finding of fact binding on us in second appeal. It has been recently pointed out by their Lordships of the Privy Council in the case of *Dhanna Mal* v. *Moti Sagar* (1) that "the proper effect of a proved fact is a question of law." In the present case the proper effect of the litigation of 1870 and of the various transactions by the different members of the family is a question of law.

As the learned counsel for the parties are not prepared to lay the entire evidence before us and as the finding recorded by the lower appellate court on the question of jointness or separation of the family, because of the reasons stated above, cannot be accepted by us, we remit the following issue to the lower appellate court for determination after consideration of the entire documentary evidence on the record :—

Whether Madho Singh and the ancestors of the defendants were joint or separate at the time of the death of Madho Singh?

No further evidence will be allowed. The finding must be returned to this Court within two months. On receipt of the finding the usual ten days will be allowed for objections.

(1) (1927) I.L.R., 8 Lahore, 573.

APPELLATE CRIMINAL.

1927
June, 2.

Before Sir Grimwood Mears, Knight, Chief Justice and Mr. Justice Lindsay.

EMPEROR *v.* MANGU.*

Act No. XLV of 1860 (*Indian Penal Code*), *section* 215—*Essential ingredients of the offence defined.*

The primary aim of section 215 of the Indian Penal Code is to punish all trafficking in crime by which a person, knowing that property has been obtained by crime, and knowing the criminal, makes a profit out of the crime, while screening the offender from justice.

Where a man undertook to attempt to recover certain horses which were believed to have been stolen, and took money for so doing; but there was no evidence to show that he had any knowledge of who the thief was, or that he was making any attempt to screen the thief from justice, or that he failed to use all means in his power to cause the offender to be apprehended, it was *held* that he could not rightly be convicted of the offence defined in section 215.

THE facts of this case are fully stated in the judgement of the Court.

The Government Advocate (Pandit *Uma Shankar Bajpai*), for the Crown.

Pandit *Kashi Narain Malaviya*, for the accused.

MEARS, C.J., and LINDSAY, J. :—On the 1st of October, 1926, a mare belonging to one Bhagwant Singh of mauza Patti Tek Chand disappeared, and on the same night a mare belonging to one Budhu Jat also disappeared from an adjoining mauza, Chhajaura. Although there is no evidence that these animals were stolen, we propose for the purposes of this case to assume that they were stolen.

*Criminal Appeal No. 464 of 1927, by the Local Government, from an order of Jogendra Nath Chaudhri, Additional Sessions Judge of Bijnor, dated the 18th of February, 1927.

The identity of the thief, or thieves, was not known; but one Mangu was suspected. He is the respondent to a Government appeal today, he having been charged, in the events which we shall set out in a few moments, with having committed an offence under section 215 of the Indian Penal Code. He was tried for that offence by a Bench of first class Magistrates of Bijnor and sentenced to one year's rigorous imprisonment. From that conviction he appealed, and the learned Additional Sessions Judge, on the 18th of February, 1927, allowed the jail appeal of Mangu and directed his acquittal.

The Local Government, believing that acquittal to have been a miscarriage of justice, appealed and that is how the matter comes before us today on the Government appeal.

We can dispose of the judgement of the Additional Sessions Judge quite shortly by saying that he disbelieved the evidence given and pointed out one or two small discrepancies. He proceeded entirely on facts, and did not believe in the good faith of the prosecution. He thought it to be a manufactured case, because the prosecution believing Mangu to have been the thief, but having no evidence against him, were endeavouring to secure his conviction by means of section 215. We do not agree with the Sessions Judge in the way in which he approached the case, but that has become a matter of very little importance today, because from the early opening of this appeal the learned Government Advocate was asked to consider with us the somewhat intricate nature of that section, and to point to the evidence on the record which would satisfy all the requirements for a conviction under it. We have come to the conclusion that all the requirements for a conviction under section 215 do not exist, and that as a matter of law Mangu is entitled to be acquitted.

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Section 215 is one which in practice very rarely comes before the courts, and it is desirable first that we should set out what we believe to be the facts of this case as disclosed by the evidence, and then we should discuss section 215 and show how the prosecution must, in our opinion, have failed from the outset.

Now, undoubtedly on the discovery of the loss of these horses Mangu was suspected. We think there can be no doubt about that, and we think that there being no evidence whatever against him, it was concluded that the best way to regain possession of the missing animals was to offer Mangu Rs. 30 if he were able to recover them. We cannot of course attach any weight to the statement that Mangu was suspected, and we have got to deal with Mangu entirely upon the evidence as it appears on the record. Now the evidence is this. Bhagwant Singh told the court how on the night of the 1st of October, 1926, his mare disappeared. He said that he had a suspicion of Mangu and other persons, and he being a zamindar of some importance in the neighbourhood, told the people of his own mauza and of the mauza from which the mare of Budhu had been taken, that they should trace out the animals, and that he was quite willing to defray the expenses. Now there was nothing improper in Bhagwant Singh making an offer to anybody that he would pay for the tracing out of the mares. That being the position, some 5 to 7 days after, Mangu, the accused, came into the village. He is a seller of water-nuts. Chhajju Singh spoke to him, and the two phrases which he used show in themselves that he was endeavouring as politely as he could to suggest to Mangu that it might be possible for him (Mangu) to recover the mares without difficulty, really on the hypothesis that Mangu had been one of the offenders. The actual translation of the original is not as it appears at page 10, line 47 onwards, in the text. The actual words which

Chhajju Singh says that he used are as follows :—" *Teri sudh men kahin yah ghorin hon to pattah chala dei.*" (If you happen to know where these horses are, then furnish a clue to them.) Mangu is said to have replied that a clue would, or might, be found but it would require money. Now there was no impropriety in either the request of Chhajju Singh or in the answer of Mangu that it was possible that a clue might be found but that the tracing would be a matter of money. A few days later Bhagwant Singh provided Rs. 30, and at an interview at which many people were present, Mangu was given Rs. 4 and he was promised the balance of Rs. 26 on the return of the horses, and for the satisfaction of Mangu the Rs. 26 was, at his suggestion, placed in the hands of Chhajju Singh. Some 10 or 12 days after this Mangu returned and told Chhajju Singh that he wanted some more money, saying that he had to go a long distance and that more money would be spent. That request was refused, and on or about the 1st of December, 1926, Mangu told Chhajju Singh that he could not find the horses anywhere. Similarly Majid says that Mangu, when asked why he had not found the horses, said "this disease is beyond my power," meaning that the tracing of them was beyond his power. The Government Advocate relies upon two extracts from the evidence—page 12, line 25 onwards and page 12, line 53 onwards. Page 12, line 25 and onwards, runs as follows—[Majid is giving evidence and he says as follows]—"This accused said 'Either I shall take it to the cattle pound, or I shall bring it in here and leave it.' " The other statement is similar, and is made by Dalu Singh :—"'Mangu was saying 'I will bring both the horses. Pay Rs. 4 at this time and deposit Rs. 26 with Chhajju Singh. I will admit them in the cattle pound or leave them near the village.' " Now the learned Government Advocate does not dissent from

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the possibility that all that has been read was or might well be taken to be prefaced by "If can get hold of the horses"; but he uses those phrases as an argument to show that Mangu's intention in taking them to the cattle pound or leaving them near the village was a desire or intention to screen the thief. The answer to that seems to be that there is no evidence that Mangu ever knew who was the offender. He may have done so, but there is nothing on the record to show that he knew who the thief was. There is nothing on the record to show that he did more than promise to attempt to trace out the horses, which we are willing to accept were stolen horses, and, if successful, to leave them in the pound or in the village—nothing beyond that. Those being the essential circumstances, the question is whether what Mangu agreed to do, and did, amounts to an offence under section 215 of the Indian Penal Code. The section runs as follows :—

> "Whoever takes or agrees, or consents to take any gratification under pretence or on account of helping any person to recover any movable property of which he shall have been deprived by any offence punishable under this Code, shall, unless he uses all means in his power to cause the offender to be apprehended and convicted of the offence, be punished with imprisonment of either description for a term which may extend to two years or with fine or with both."

Now that section has been the subject of two decisions in this Court, and it has also been considered by Mr. Mayne in the 4th edition of his work on Criminal Law in India, at page 271. In his commentary Mr. Mayne says :—

> "The primary aim of the section is to punish all trafficking in crime, by which a person knowing that property has been obtained by crime, and knowing the criminal, makes a profit out of the crime, while screening the offender from justice."

Now we pause here for a minute to examine what Mr. Mayne puts forward as the essential ingredients. You must have a person knowing that property has been obtained by crime. In this particular case, as we are going to order the release of Mangu, we are willing to assume that the horses were in fact the subject of a theft on the night of October 1st, and that Mangu, having been informed of that, believed it to be the fact. We now come to this difficulty in the way of "the screening" and "knowing the criminal." There is, as we have said, not the least evidence that Mangu knew the criminal; and if we have to take the record, Mangu is entitled to ask us to give weight to the two places in the evidence where the prosecution agree that he said that he could not find the horses anywhere, and also that the finding of the horses was beyond his power. Therefore, if we take the evidence as it stands, Mangu was a man who had undertaken to endeavour to trace out and to restore the horses to their rightful owners if he was able to do so, and in the event of his being successful he was to be paid Rs. 30. But there is no suggestion in the bargain, at any stage of the proceedings, that he intended to screen the offender, and that, as will be seen, is the third essential spoken of by Mr. Mayne in his commentary. Mr. Mayne continues :—

"It is not an offence to take money from another in order to help him to find the property and to convict the thief. It is an offence for one who knew of the commission of the crime, and who could at once have informed upon the offender, to wait till a reward is offered, and then to take money from the owner of the property under colour of getting the property back for him. The section is not intended to apply to the actual thief, but to some one who, being in league with the thief, receives some gratification on account of helping the owner to recover stolen property, without at the same time using all the means in his power to cause the thief to be apprehended and convicted of his offence."

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Now, there again, "being in league with the chief" is a necessary act to be proved. The way in which the Government Advocate puts it is that the intention to leave the horses in the pound had its origin in the desire to screen the offender. It may of course bear that complexion but it equally supports this intention, namely; that Mangu, if he ascertained the whereabouts of these animals, was proposing himself to take them away from the unlawful possession in which they were and quietly and secretly restore them to the owners, Bhagwant Singh and Budhu, by leaving them in the pound or near the village and that in doing this Mangu was not anxious that the part he had taken in the matter should be known—and that he made these suggestions, that he should put them in the cattle pound or leave them in the village, for his own protection, so that it should not be known by the thieves that his had been the hand that had restored them to the owners. It may have been his intention to screen the original thief, but it may equally have been that he intended to save himself from the vengeance of the people from whom he intended to take away the horses if he discovered their whereabouts.

We are, therefore, of opinion that this prosecution was not started with the necessary facts which alone could support it, and that it fails because, strictly speaking, there is no evidence that the horses had been stolen, though for the purposes of this case we have been, in this particular instance, willing to accept that they were stolen, but there is certainly no evidence that Mangu knew the criminal, no evidence that he was making any attempt to screen that criminal from justice, or that he failed to use all means in his power to cause the offender to be apprehended. On those grounds we affirm the order whereby the Additional Sessions Judge acquitted Mangu, though, as we have said, we differ from him in

the reasons which he has given for such acquittal. Mangu is in Court and may leave the Court at once. The office will make the necessary arrangements to enable him to return to his village.

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Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Ashworth and Mr. Justice Iqbal Ahmad.

BALWANT SINGH AND OTHERS (OPPOSITE PARTIES) *v.* PARTAP SINGH (APPLICANT).*

1927
June, 6.

Act (Local) No. III of 1901 *(United Provinces Land Revenue Act), sections* 111 *and* 112*—Appeal—Civil or Revenue Court—Question of proprietary title—Right of co-sharer to hold in severalty.*

The right of a co-sharer to hold in severalty, if disputed, involves a question of a proprietary title, within the meaning of sections 111 and 112 of the United Provinces Land Revenue Act, 1901.

Tulsi Ram v. *Gate Ram Rai* (1), *Muhammad Nazar-ullah Khan* v. *Muhammad Ishaq Khan* (2), *Ram Narain* v. *Jagan Nath Prasad* (3) and *Parsidhan Rai* v. *Dhaneshar Rai* (4), referred to.

THE facts of this case sufficiently appear from the judgement of the Court.

Dr. *M. L. Agarwala*, for the appellants.

Munshi *Vishun Nath*, for the respondent.

ASHWORTH and IQBAL AHMAD, JJ. :—This second appeal arises out of an application for partition made by the respondent under section 107 of the U. P. Land Revenue Act (III of 1901).

*Second Appeal No. 1182 of 1925, from a decree of E. L. Norton, District Judge of Jhansi, dated the 17th of March, 1925, confirming a decree of Bakhtawar Singh, Assistant Collector, First Class, of Jalaun, dated the 6th of September, 1924.

(1) Weekly Notes, 1904, p. 225. (2) (1910) I.L.R., 32 All., 523.
(3) (1915) I.L.R., 38 All., 115. (4) (1925) 86 Indian Cases, 1033.

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The applicant applied for partition, stating that he was a co-sharer in a certain mahal to the extent of two annas, that the mahal was divided into several *khatas*, and that his two anna share was in *khata* No. 1 (which was held in severalty by certain of the co-sharers in the whole mahal). He also stated that there was a *shamlat khata* No. 5 in which he had a common interest along with the other co-sharers. He went on to say that there were always disputes between the parties (he had made all the co-sharers in the mahal parties as non-applicants to the case) in connexion with the collection of rent and payment of Government revenue. He, therefore, prayed for a complete mahal to be formed by partition of his two anna share along with his interest in the *shamlat* land. Now a mahal is defined as a local area under a separate engagement for the payment of land revenue. There are two kinds of partition. In "perfect partition" the whole mahal is divided and the several portions become separate mahals, each severally responsible for the revenue distributed thereon. In "imperfect partition" the several portions remain jointly responsible for the revenue assessed on the whole mahal (see section 107 of the Land Revenue Act). A hasty perusal of the application might lead to the conclusion that the applicant merely wanted an imperfect partition. This would have freed him from liability to disputes in connexion with the collection of rent. A more careful study of the application clearly shows that the applicant wished for perfect partition. He wanted a separate mahal for himself and he wanted to avoid disputes as to the payment of revenue. Moreover, he asked that he should be given a portion of the *abadi* equivalent to his share. A proclamation was issued calling on the recorded co-sharers to state their objections to the partition. No objection was filed within the time allowed, and presumably the partition proceeding declaring and detailing how the partition was to be made

was framed under section 114 of the Land Revenue Act. The present appellants are co-sharers in a *khata* or *patti* No. 3. They had apparently, and not without excuse, understood that the partition would be made merely by giving the applicant a specific area in *khata* No. 1, which he along with certain other co-sharers held in severalty, and a portion of the *shamlat khata* No. 5. The partition proceeding, however, recorded that the partition would be made by awarding the applicant a portion of the whole mahal, that is to say, in all the *khatas* including those held in severalty by co-sharers other than the applicant. The collector or officer making the partition is entitled under section 125 to ignore *khatas* held in severalty "if the partition cannot otherwise be conveniently carried out." We must presume that he had come to the conclusion that section 125 must be invoked. The appellants, as holders of *khata* No. 3, objected. It is not clear from the record whether their objection was put in before the partition proceeding was framed or subsequently. It may be that they put in their objection as soon as they knew of the intention of the partition officer to ignore the separate *khatas* and partition in the manner described as "*chakbast*". Indeed they put in two objections. It is permissible to assume that one was put in before the partition proceeding was framed and one after. The first one may have been intended to raise a claim that they held *khata* No. 3 in severalty. The second one may have been intended to represent that no invocation of section 125 was necessary. It makes no difference, however, to our decision in this case whether either or both of the objections by the appellants preceded the framing of the partition proceeding. The partition officer considered the objection from both points of view. He held that if it was an objection raising a claim to hold

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khata No. 3 in severalty, then it was time-barred (the correctness of which decision the District Judge did not consider and we consider it unnecessary to consider). On the other hand if it was an application objecting to the invocation of section 125, it was challenging a discretionary power of the court which could not be challenged except by an application to the Collector at the time of the confirmation of the partition proceedings. The Collector upheld the *chakbat* method, i.e., the application of section 125. The appellants appealed to the District Judge against the order of the partition officer declaring the objection to be time-barred if regarded as a claim that the objectors held *khata* No. 3 in severalty.

The District Judge threw out the appeal on the ground that the matter had already been decided by the Collector. In this he appears to have been wrong. Treated as an objection that *khata* No. 3 was held by the objectors in severalty, the matter had not been decided by the Collector. It had been decided by the partition officer, the objection being thrown out as time-barred. In the memorandum of this appeal it is urged that the appeal before the Collector related to one phase of the case, and this appeal relates to a question of proprietary title. The appellants are right in saying that the appeal or application to the Collector related to a subsequent phase of the case, namely, the method of partition, as opposed to the right and title of the co-sharers in the mahal.

It does not follow, however, that the District Judge was wrong in holding that he had no jurisdiction to hear the appeal. This depends upon whether the objection that *khata* No. 3 was held by the appellants in severalty involved a question of proprietary title. If it did, then under sections 111 and 112 of the Act the decision would be open to appeal to the District Judge. If it did not

and merely involved a disputed question as to the method of partition or as to any right not amounting to a proprietary right, then no appeal would lie to the District Judge. In support of the appellants' contention that the objection involved a question of proprietary title, certain decisions of this Court have been cited to us. Before considering them we will state our view of the matter, because we shall be able to show that with this view none of the decisions cited conflict.

An objection or application stating that the applicant or objector has a certain title in any local area only involves a question of proprietary title if that title is denied. In the present case, so far from it appearing that the appellants' title to hold *khata* No. 3 in severalty was disputed, it would seem that their claim was admitted by the applicants. At any rate the applicant did not pretend to have any interest in *khata* No. 3 as a holder in severalty. We are, therefore, prepared on this ground alone to hold that no question of proprietary title arose.

It has, however, been argued that even if the objection had been disputed by anyone, it would still not involve a question of proprietary title. With this contention we do not concur. The expression "proprietary title", in our opinion, will include not only the title to be proprietor or co-sharer but also any rights appurtenant to such a title. Primarily all the co-sharers in a mahal, i.e., a unit under a separate engagement for the payment of land revenue, have a title to own and possess the mahal jointly. This title may give way to a title to hold in severalty different areas, i.e., *khatas* or *pattis* in the mahal. This is effected by what is called a private partition. The title arising under a private partition is nonetheless a proprietary title because it is acquired without Government intervention, and is subject to the general

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liability of all co-sharers for the whole revenue of the mahal. Section 32 of the Land Revenue Act, which prescribes the registers to be included in the record of rights, recognizes in Agra three classes of persons having interest in a mahal. One class is the proprietors, another class is the holders of land revenue-free, and a third class is tenants and persons occupying land otherwise than as proprietors or cultivators. Sections 55 and 84 also recognize the co-sharers holding in severalty. The right of a co-sharer to hold in severalty does, therefore, if disputed, in our opinion, involve a question of a proprietary title.

All the decisions cited to us appear to be in conformity with this view. In *Tulsi Ram* v. *Gate Ram Rai* (1) and in *Muhammad Nazar-ullah Khan* v. *Muhammad Ishaq Khan* (2), it was merely held that an objection to give effect to a private partition, which was not disputed, was an objection to the method of partition and did not involve a question of proprietary title. In *Ram Narain* v. *Jagan Nath Prasad* (3) the objection was that there had been a private partition. Presumably this objection must have been contested, because the partition officer directed the objector to bring a suit in the civil court. If the objection had not been resisted no question could have arisen. This decision therefore confirms our view that a disputed claim as to severalty land is a question of proprietary title. Again in *Parsidhan Rai* v. *Dhaneshar Rai* (4), it was held that where there was a dispute as to the area and value of the land held in severalty, a question of proprietary title arose. This clearly was not a dispute as to the method of partition merely. In conclusion, therefore, we hold that in this case the appellants did claim a right to hold in severalty a certain *khata* of the mahal which was to be partitioned, and that this was a claim of proprietary right, but that inasmuch as this claim was

(1) Weekly Notes, 1904, p. 225.
(2) (1910) I.L.R., 32 All., 523.
(3) (1915) I.L.R., 38 All., 115.
(4) (1925) 86 Indian Cases, 1033.

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not disputed, no question of proprietary title arose for decision by the partition officer. The real dispute was whether this right of holding in severalty should be ignored in the partition by invocation of section 125 of the Land Revenue Act, and that dispute did not raise a question of proprietary title.

We, therefore, hold, but on a different ground, that the District Judge was right in holding that no appeal lay to him, and dismiss this appeal with costs.

Appeal dismissed.

REVISIONAL CIVIL.

Before Mr. Justice Ashworth and Mr. Justice Iqbal Ahmad.

KAMTA SINGH (DEFENDANT) *v.* BHAGWAN DAS AND ANOTHER (PLAINTIFFS) AND RAJA SINGH AND OTHERS (DEFENDANTS).*

1927 *June*, 6.

Civil Procedure Code, section 115; *order XXIII, rule* 1—*Revision—Order permitting withdrawal of suit with liberty to file fresh suit—Reasons not stated—Material irregularity.*

For a court to invoke order XXIII, rule 1, without giving any reason amounts to a material irregularity in exercising jurisdiction given to it by that rule. If the court is of opinion that an application to withdraw a suit with liberty to bring a fresh one should be granted, it must set forth its reasons for holding that it should be granted, clearly stating whether it is by reason of a formal defect or by reason of some other sufficient cause.

THE facts of this case sufficiently appear from the judgement of the Court.

Munshi *Shiva Prasad Sinha*, for the applicant.

Munshi *Haribans Sahai*, for the opposite parties.

ASHWORTH and IQBAL AHMAD, JJ. :—This is an application in revision against an order of the Munsif of

*Civil Revision No. 105 of 1927.

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Jaunpur allowing the non-applicant to withdraw his suit with liberty to bring a fresh suit. The order of the Munsif is impugned before us on the ground that the Munsif had no jurisdiction to permit the withdrawal of the suit with liberty to bring a fresh suit, unless and until he had decided that there was a formal defect in the suit or some other sufficient ground. The order of the Munsif fails to mention the reason why he granted the plaintiff permission to withdraw the suit with liberty to bring a fresh suit. It is permissible, however, in this circumstance to refer to the application of the non-applicant. In that application two grounds were set out. One was that the success of the suit depended upon proof of a fact which could only be proved by production of a certain cash book, whereas the applicant had only produced a ledger. The second ground was that there were other persons who were necessary parties to the suit. It is unnecessary to decide whether either of these facts would give the lower court jurisdiction. It is sufficient to say that, in our opinion, the permission as a matter of discretion should not have been allowed on the grounds stated. We admit that if the lower court has erred in the exercise of its discretion no application in revision would lie. But as the order of the lower court does not set forth the reasons for giving the permission, it is possible that the lower court considered that permission to withdraw with liberty to bring a fresh suit could be granted without any condition precedent rather than that it abused the discretion imposed on it by law. In any case we should hold that for a court to invoke order XXIII, rule 1, without giving any reason amounts to a material irregularity in exercising jurisdiction given to the court by that rule. In the circumstances, we consider it necessary to set aside the order of the lower court and to direct the lower court to proceed with the case from the point where the plaintiff had put in the application now impugned. The

lower court must reconsider that application and pass an order on it. If the court is of the opinion that notwithstanding the opinion expressed above, the application should be granted, it must set forth its reasons for holding that it should be granted, clearly stating whether it is by reason of a formal defect or by reason of some other sufficient cause. If the court rejects the application, it will still be open to the court to allow the plaintiff to add any necessary party and to produce any necessary evidence, provided of course that the court gives reasons for allowing this and awards appropriate costs. This is not to be construed to mean that the court must allow parties to be added or evidence to be produced. We are told that circumstances exist, such as the conclusion of the evidence on both sides and the conclusion of arguments, which would make such an order improper. It will be for the lower court to consider this aspect of the matter.

Various decisions of this court have been cited to us in the course of the hearing. We do not consider it necessary to examine them in detail. They appear to us merely to be authority for the proposition that provided a court finds that the suit must fail by reason of some formal defect or that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit, then in revision the exercise of the discretion of the court cannot be questioned. In a case like the present one, where the lower court has given no reasons, it will always be difficult to decide whether the order of the court is based on an assumption of jurisdiction not vested in it by law, namely, to allow the suit to be withdrawn without satisfying the conditions of order XXIII, rule 1, or whether it is based on the discretion allowed by the rule. In such cases, then, the correct method seems to be to hold that the court has exercised its jurisdiction irregularly in failing to record its reasons for exercising that jurisdiction. At least this is the view which we take in the present case.

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The order of the lower court will, therefore, be set aside including the order requiring the plaintiff to pay the defendant full costs plus Rs. 15. Those costs, if paid, should be refunded to the plaintiff. The defendant applicant will get the costs of this application.

Order set aside.

APPELLATE CIVIL.

Before Mr. Justice Sulaiman and Mr. Justice Banerji.

1927
June, 6.

NISAR HUSAIN AND ANOTHER (DEFENDANTS) *v.* SUNDAR LAL AND OTHERS (PLAINTIFFS) AND PEARE LAL (DEFENDANT).*

Act No. IV of 1882 (*Transfer of Property Act*), *section* 52—*Mortgage—Lease executed by mortgagor after passing of decree for sale—Lease voidable by auction purchaser—"Agricultural holding"—Procedure—No vested interest in procedure.*

Held (1) that a lease of complete specific *khewat* numbers, with areas and Government revenue separately specified, and where the lessee is given power to cultivate the lands himself or to have them cultivated by other tenants, is a lease of an agricultural holding within the meaning of the Agra Tenancy Act, 1901;

(2) that a suit for a declaration that such a lease is invalid is not exclusively confined to a civil court and the revenue court has jurisdiction to declare it invalid;

(3) that where such a lease was executed after a decree for sale had been passed on a mortgage which comprised the property leased, the lease could not enure beyond the time when the mortgaged property was sold in execution of the decree, and could be avoided by the purchaser under section 52 of the Transfer of Property Act;

(4) that enactments dealing with procedure have an immediate effect and must, unless the contrary is expressed, apply to all actions, whether commenced before or after the passing of the Act.

*First Appeal No. 465 of 1924, from a decree of P. C. Mogha, Subordinate Judge of Muzaffarnagar, dated the 31st of May, 1924.

Sher Khan v. *Debi Prasad* (1), *Ram Singh* v. *Girraj Singh* (2) and *Raghunath* v. *Ganesh* (3), referred to. *Rani Dhandei Kuar* v. *Chhotu Lal* (4) and *Amina Bibi* v. *Saiyid Yusuf* (5), distinguished.

This was a defendants' appeal arising out of a suit for ejectment. The plaintiffs and defendant No. 3, who formed a joint Hindu family, obtained a decree for sale on the basis of a mortgage-deed against Basharat Husain. While this decree was in execution, Basharat Husain executed a lease, dated the 29th of September, 1919, in favour of the father of Nisar Husain, defendant No. 1, for a period of 10 years. This lease comprised a number of *khewats* in three villages out of several which were included in the mortgage. In 1921 the decree-holders purchased the mortgaged properties at auction and later obtained formal delivery of possession against the mortgagor. They have now brought this suit for ejectment of the lessee in the civil court. The main defence of the lessee consisted of a plea that there was relationship between the parties of zamindar and lessee, and the civil court had no jurisdiction to eject the defendant, and a further plea was that in view of certain proceedings in 1920 the present claim was barred. The first court decreed the suit and the mortgagor and the lessee appealed.

Mr. *Akhtar Husain Khan*, for the appellants.

Dr. *Kailas Nath Katju*, for the respondents.

THE judgement of the Court (SULAIMAN and BANERJI, JJ.), after setting forth the facts as above, thus continued :—

It appears that Piari Lal, defendant No. 3, had also a simple money decree against his mortgagor and executed it by attachment of the rents due from the tenants

(1) (1915) I.L.R., 37 All., 254. (2) (1914) I.L.R., 37 All., 41.
(3) (1919) I.L.R., 42 All., 222. (4) (1921) 19 A.L.J., 890.
(5) (1922) I.L.R., 44 All., 748.

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Nisar Husain intervened and raised an objection under order XXI, rule 58 of the Code of Civil Procedure that he was in possession as a lessee and that the rents due from the tenants could not be attached by the decree-holder. On the 1st of May, 1920, the lessee's objection was allowed, it being held that the lease was not fictitious. The defendants contend that this order bars the present claim, inasmuch as no suit for a declaration that the lease was fictitious was brought within one year of the order. In our opinion the order is final only to the extent that the lease was not fictitious and was not a mere waste paper. It cannot, however, prevent the plaintiffs from seeking to avoid the lease on the ground that it was executed during the pendency of their mortgage suit. It is obvious that in the proceedings relating to the execution of the simple money decree the present plaintiffs could not have avoided the lease on the ground of its being a *pendente lite* transfer. The order of the 1st of May, 1920, cannot, therefore, be a bar so far as the avoidance of the lease on this last mentioned ground is concerned.

Although a defendant in a mortgage suit has power, so long as he retains his possession, to grant leases in the ordinary course of management of his property, he cannot make transfers to enure beyond the time when the property passes by sale to his mortgagees. Such a transfer, if made, can undoubtedly be avoided under section 52 of the Transfer of Property Act. The point which the court below had to consider first was whether the suit related to an agricultural holding, for if it did, then the defendant lessee having pleaded that he was a tenant of the plaintiff, the court was bound to proceed under section 202 of the old Agra Tenancy Act. The lease in question was not a lease of any fractional undivided shares in villages, in which case the lessee can merely collect rents from joint tenants. It was a lease of specific complete *khewat*

numbers, with areas and Government revenues separately specified, and the lessee was expressly given power to cultivate the lands himself or to have them cultivated by the other tenants. When specific areas are leased and express power is given to the lessee to take actual possession of those areas and he has the option to cultivate them himself, it is difficult to hold that the lease is not for agricultural purposes. The document does not in any way suggest that the lease was granted for any non-agricultural purpose. The form of the document is the ordinary form of leases which may be granted by a zamindar to tenants of specific plots. These *khewat* lands are undoubtedly agricultural lands. A holding was defined as a parcel or parcels of land held under one tenure, engagement or one lease, and land was defined as land which was let or held for agricultural purposes. We, therefore, find it very difficult to agree with the court below that the lands let under the lease did not constitute an agricultural holding. It follows that it was incumbent on the court below to proceed according to section 202.

It has been contended on behalf of the respondents that a suit for a declaration that the lease is void or not binding on the plaintiff can only lie in the civil court, and that the revenue court can have no jurisdiction to declare it invalid. This contention, in our opinion, has no force. No doubt under the old Act the question as to which court should eject a *thekadar* was often a matter of considerable difficulty. The position has now been simplified by the enactment of chapter XIII of the new Act. But even under the old law the revenue court had jurisdiction to go into the question of the validity of a lease. Such a point arose in the case of *Sher Khan* v. *Debi Prasad* (1), where the plaintiff, on having obtained possession of a zamindari share on his auction-purchase,

(1) (1915) I.L.R., 37 All., 254.

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found in existence a perpetual lease of a portion of the property. PIGGOTT, J., held that his natural remedy, if as a matter of fact the lease was executed under such circumstances as not to be binding upon him, was by way of a suit for ejectment under section 58 of the Tenancy Act and that such a suit would be cognizable by the revenue court. The learned Judge further held that the plaintiff in such a case would seek for ejectment of the defendants lessees on the ground that they held only as tenants from year to year; that in reply the perpetual lease would be set up and in order to the determination of the question thus raised the revenue court would have to decide whether the said lease was valid and binding on the plaintiff. CHAMIER, J., agreed with that view, and both the learned Judges held that the case was covered by the principle of the decision in *Ram Singh* v. *Girraj Singh* (1) where it had been laid down that a revenue court has jurisdiction to go into the question of the validity or invalidity of a lease set up by a defendant. The cases of *Rani Dhandei Kuar* v. *Chhotu Lal* (2) and of *Amina Bibi* v. *Saiyid Yusuf* (3) are distinguishable. In the former case the property said to have been leased consisted of a *taluqa* of 26 complete villages, a market, grove and several houses. It was accordingly held that the suit did not relate to an agricultural holding. In the latter case the learned Judge had found that the mind of the lessor was deranged, and he was mentally unfit and incapable of understanding or realising the effect of the lease; and accordingly it was held that the lease was void from its very inception and the position of a person holding under such a lease was that of a trespasser. The property comprised in the lease consisted of an undivided fractional share in a village, namely, a 6 anna and 4 pie share, and the court was of opinion that it was not an agricultural holding.

(1) (1914) I.L.R., 37 All., 41. (2) (1921) 19 A.L.J., 890.
(3) (1922) I.L.R., 44 All., 748.

The procedure followed in the case of *Raghunath* v. *Ganesh* (1) was to set aside the decree of the court below and to return the record with directions to re-admit the suit on its original number and to proceed according to section 202 of the Tenancy Act.

Since the passing of the first court's decree the Agra Tenancy Act of 1901 has been replaced by Act III of 1926, and in the place of the old section 202 we now have section 273 which lays down a slightly different procedure. Section 2 has expressly repealed the former Act. The question is whether the court below should now follow the procedure laid down under section 273 of the new Act or that under section 202 of the old Act. In our opinion enactments dealing with procedure have an immediate effect and must, unless the contrary is expressed, apply to all actions, whether commenced before or after the passing of the Act. A party has no vested right in mere procedure. The courts have to adopt the procedure laid down by statutes which are in force for the time being. The provisions of section 273 are undoubtedly a rule of procedure, and not a matter of substantive law. We have, therefore, no hesitation in saying that the court below should follow the procedure laid down by section 273, and instead of requiring the defendant to institute a suit in the revenue court for the determination of the question of tenancy, frame an issue on the plea of tenancy and submit the record to the appropriate revenue court for the decision of that issue only.

We accordingly allow this appeal and, setting aside the decree of the court below, send the case back to that court with the direction that it should re-admit it and proceed as directed by section 273 of Act III of 1926. Having regard to all the circumstances of the case, we think that the costs incurred in the court below and in this appeal should abide the event.

Appeal allowed.

(1) (1919) I.L.R., 42 All., 222.

MISCELLANEOUS CIVIL.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Lindsay.

1927 *June*, 7.

MATHURA KURMI (DEFENDANT) v. JAGDEO SINGH AND OTHERS (PLAINTIFFS).*

Civil Procedure Code, section 110—*Appeal to His Majesty in Council*—"*Substantial question of law*"—*Construction of document.*

Held, on an application for leave to appeal to His Majesty in Council, that, the only question for decision in either court being whether the legal relation of the parties arising out of the execution of three documents of even date was that of mortgagor and mortgagee by conditional sale or that of vendor and purchaser subject to an option of re-purchase, the decision of which depended on the application of well-defined legal principles to a particular set of facts, this did not involve a "substantial" question of law within the meaning of section 110 of the Code of Civil Procedure. *Balkishen Das* v. *Legge* (1), *Jhanda Singh* v. *Wahid-ud-din* (2) and *Narasingerji* v. *Parthasaradi Rayanam Garu* (3), referred to.

THIS was an application for leave to appeal to His Majesty in Council. The facts of the case sufficiently appear from the judgement of the Court.

Munshi *Kamala Kanta Verma*, for the applicant.

Pandit *Rama Kant Malaviya*, for the opposite parties.

MEARS, C.J., and LINDSAY, J. :—This is an application for leave to appeal to His Majesty in Council against the decree of a Bench of this Court in First Appeal No. 459 of 1923, decided on the 21st of December, 1926. The appeal was dismissed and the decree

*Application No. 18 of 1927 for leave to appeal to His Majesty in Council.

(1) (1899) I.L.R., 22 All., 149. (2) (1916) I.L.R., 38 All., 570.
(3) (1924) I.L.R., 47 Mad., 729.

of the trial court was affirmed. The value of the subject-matter in the first court was over Rs. 10,000 and the value of the subject-matter of the proposed appeal to His Majesty is also above that sum. But we are asked to certify that the case fulfils the conditions of section 110 of the Code of Civil Procedure on the ground that the appeal involves a substantial question of law, or, in the alternative, to certify that it is otherwise a fit case for appeal.

The question which arose for decision in the court below and in this Court was with regard to the legal relation of the parties arising out of the execution of three documents executed on the 22nd of May, 1915. The case for the plaintiffs was that they were mortgagors and that the defendant, Mathura Kurmi, was their mortgagee. The defendant's case was that he was the purchaser of the property in dispute subject to an option of re-purchase, of which the plaintiffs had failed to take advantage.

The decision of the trial court, affirmed in this Court, was that the three documents were evidence of a single transaction, namely, a mortgage by conditional sale, and that the plaintiffs were entitled to recover the property by redemption. As is pointed out in the judgements delivered in this Court, cases of this nature are frequently brought before the courts in India, and many of them have been taken in appeal to His Majesty in Council. We may refer in particular to the following three cases—*Balkishen Das* v. *Legge* (1), *Jhanda Singh* v. *Wahid-ud-din* (2), and *Narasingerji* v. *Parthasaradi Ra-Yanam Garu* (3). It has been settled definitely that the test to be applied in such cases is the intention of the parties at the date of the transaction which has to be construed and the decisions lay down the various matters

(1) (1899) I.L.R., 22 All., 149. (2) (1916) I.L.R., 38 All., 570.
(3) (1924) I.L.R., 47 Mad., 729.

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which may legitimately be considered by the courts in order to determine what the intention of the parties was. Intention is a matter of fact and not of law, and where, as in the case now before us, both courts find that the parties stand in the relation of mortgagor and mortgagee, the finding is one of fact, namely, that on the date on which the parties entered into the transaction their intention was to constitute that relation between themselves.

If it be admitted, however, that the question is not one of pure fact because the decision involves the construction of legal documents, the point remains whether any question of law is raised which can be deemed to be a substantial question. Obviously any question of law arising upon the interpretation of the documents considered in this case is not substantial in the sense of being a question of general interest: it is of importance only to the present parties. But, in view of a recent decision of their Lordships, it is contended that a question of law, in order to be substantial, need not be a question of general interest: it may still be substantial although it concerns only the parties to the litigation. And so it is sought to be argued that we have here a question of substance because, it is suggested, that the tests and principles of interpretation prescribed by the Privy Council have not been correctly applied to the facts.

We are not prepared to hold that for this reason the question of law between the parties here, assuming it to arise at all, is a substantial question. It is not made to appear that the appeal, if allowed to proceed, could furnish an occasion for the discussion or enunciation of any fresh legal principle. The matter has been agitated time and again before their Lordships who have repeatedly laid down the law in the sense indicated above. In these circumstances we do not think that the application of well-defined legal principles to a particular set of facts

raises any question of law which can fairly be described as substantial.

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The case does not, in our opinion, fulfil the requirements of section 110 of the Code of Civil Procedure. Nor is it a case which we could certify as being otherwise fit for appeal to His Majesty.

We dismiss the application with costs.

Application dismissed.

APPELLATE CIVIL.

Before Mr. Justice Sulaiman and Mr. Justice Banerji.

SALIG RAM MISIR (PLAINTIFF) *v.* LACHHMAN DAS (DEFENDANT).*

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June, 7.

Act No. IX of 1872 *(Indian Contract Act) section* 134*—Principal and surety—Remedy of creditor against principal debtor allowed to become time-barred—Discharge of surety —Appeal—Operation of decree not suspended by the filing of an appeal.*

If a creditor allows his remedy against the principal debtor to become barred by time, the legal consequence of this is that the principal debtor is discharged within the meaning of section 134 of the Indian Contract Act, 1872, and the creditor can no longer proceed against the surety. *Hazari v. Chunni Lal* (1), *Radha* v. *Kinlock* (2) and *Ranjit Singh* v. *Naubat* (3), referred to.

Held also that under the Indian law and procedure an original decree is not suspended by presentation of an appeal nor is its operation interrupted when the decree is one of dismissal, and the cause of action arises on the passing of the first court's decree and is not suspended till that decree is finally affirmed on appeal. *Juscurn Boid* v. *Pirthichand Lal Choudhury* (4), followed.

*First Appeal No. 463 of 1924, from a decree of Man Mohan Sanyal, Subordinate Judge of Benares, dated the 19th of May, 1924.

(1) (1886) I.L.R., 8 All., 259.
(2) (1889) I.L.R., 11 All., 310.
(3) (1902) I.L.R., 24 All., 504.
(4) (1918) I.L.R., 46 Calc., 670.

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SALIG RAM MISIR v. LACHHMAN DAS.

THIS was a plaintiff's appeal arising out of a suit brought by Salig Ram Misir, creditor, to recover the amount due from his principal debtor, the suit being brought against Lachhman Das surety. On the 28th of March, 1912, a mortgage-deed was executed in favour of Salig Ram by Musammat Tulsa Kunwar and Lachhmanji, for Rs. 2,000, under which a house was mortgaged. On the same date a security bond was executed by Lachhman Das as a surety, undertaking that if the amount of the mortgage money was not recovered from the property mortgaged or from the mortgagors, the mortgagee would be entitled to recover the whole of the amount together with the costs and the damages from the personal property of the surety.

Salig Ram brought a suit on the basis of his mortgage for sale of the house, but a defence was put forward on behalf of a minor son of Lachhmanji that there was no legal necessity for the mortgage. On the 22nd of January, 1916, the court held in favour of the minor and accordingly declined to enforce the mortgage against the property, but a simple money decree was passed against the executants. The decree-holder then proceeded to execute the decree by attaching the very house which had been released from the charge. Objections were raised to the attachment by one Chaturbhuj to the effect that the house did not belong to Lachhmanji at all but belonged to the objector. The objections were summarily dismissed under order XXI, rule 58, and the house was in due course put up for sale and purchased at auction for Rs. 2,150 by the decree-holder himself who obtained possession. Chaturbhuj, on the 1st of September, 1917, instituted a suit for declaration of his title and for possession of the house. This claim was decreed on the 31st of July, 1918, by the trial court, conditional on the payment of an amount representing the cost of certain improvements which had been made by Salig Ram. Two

appeals were preferred from this decree. One by Salig Ram challenging the finding that the property belonged to Chaturbhuj, and the other by Chaturbhuj challenging the amount of the compensation. These appeals were disposed of on the 4th of May, 1921; Salig Ram's appeal was dismissed, and the appeal preferred by Chaturbhuj was allowed in part and the amount of compensation was reduced slightly. The result of the first court's decree was that during the pendency of the appeal, Salig Ram was dispossessed from the house on the 26th of December, 1918.

After having been dispossessed from the house in execution of the decree in favour of Chaturbhuj, Salig Ram took no further steps against his principal debtors Lachhmanji and Musammat Tulsa Kunwar. He did not, for instance, try to revive the execution proceedings or to execute the decree by arrest of the person of the judgement-debtors or by attachment of their properties. He also did not file any application under section 47 of the Civil Procedure Code.

What he did was that he instituted the present suit which was filed on the 29th of January, 1924, against the surety Lachhman Das only. The principal judgement-debtors were not made parties to the present suit.

The claim was contested by Lachhman Das who pleaded that the remedy against the principal debtors had been exhausted and no claim lay against him. There was a further plea that in consequence of several acts and omissions committed by Salig Ram the surety had been discharged. The first court acceded to the contention of the defendant and dismissed the suit. Hence this appeal.

Dr. *Kailas Nath Katju* and Munshi *Harnandan Prasad*, for the appellant.

Babu *Piary Lal Banerji* and Pandit *Gopi Nath Kunzru*, for the respondent.

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THE judgement of the Court (SULAIMAN and BANERJI, JJ.), after stating the facts, thus continued :

The first point for consideration is whether the plaintiff, Salig Ram, having got his decree satisfied by purchase of the house, is entitled to re-open the matter and to assert that there has in fact been no satisfaction because the property purchased by him has ultimately gone out of his possession. It is clear on the authorities that if the purchase had been made by a stranger and no application by him had been preferred for setting aside the sale under order XXI, rule 91, on the ground that the judgement-debtor had no saleable interest, he would have no further remedy by a separate suit to claim a refund of the amount paid by him as purchase-money from the decree-holder. [Certain authorities were referred to.] Thus, if the house had been purchased by a third party he would not have been entitled to get back the purchase-money on the ground that Chaturbhuj in a subsequent suit had been dispossessed. Of course in such a case the purchase-money would have been retained by the decree-holder himself.

The question before us is whether the decree-holder who purchased the property himself is in a better position than an innocent third party. It is the decree-holder himself who took the mortgage of the house and, when the charge failed, attached the property and put it up for sale. It was he himself who purchased it in spite of the fact that objections were raised by Chaturbhuj that the property belonged to him and had been acquired by him under a sale-deed of 1867. The question is whether Salig Ram can, even after the confirmation of the sale, apply under section 47 of the Code and claim that the decree has nevertheless not been satisfied. The only case on this point which has been cited by counsel before us

is the case of *Upaw* v. *N. R. M. Chetty* (1), which strongly supports the contention of the respondent that even the decree-holder purchaser is debarred from going behind the confirmation of the sale. In this case, however, we do not feel that we are called upon to decide this point finally, as we are of opinion that the suit must fail on a different ground.

Under section 134 of the Indian Contract Act, a surety is discharged by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor. So far as this High Court is concerned, it is now well settled that if the remedy of the creditor against the principal debtor is allowed to become barred by time, the surety is deemed to have been discharged. No doubt the other High Courts have taken a contrary view, but we are bound to follow our own rulings unless overruled by their Lordships of the Privy Council. We may further note that the words in section 134 are not that by any act or omission of the creditor the debt became extinguished. The words are that the "legal consequence of which is a discharge of the principal debtor." The view taken by this Court is that when the remedy against the principal debtor is barred by time and ceases to be enforceable, the legal consequence of this circumstance is that the principal debtor is discharged. If the surety were still liable to pay the amount, he would in his turn be entitled to proceed against the debtor and recover the amount from him even after limitation has set in. We may only refer to the cases of this Court, *Hazari* v. *Chunni Lal* (2), *Radha* v. *Kinlock* (3) and *Ranjit Singh* v. *Naubat* (4). The point has been discussed at considerable length in these cases and it is not necessary for us to go into it in any detail. It must be taken that if Salig Ram allowed his remedies

(1) (1920) 61 Indian Cases, 805.
(2) (1886) I.L.R., 8 All., 259.
(3) (1889) I.L.R., 11 All., 310.
(4) (1902) I.L.R., 24 All., 504.

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to become barred as against Lachhmanji and Musammat Tulsa, it is no longer open to him to proceed against the surety.

The point that now remains to be considered is whether Salig Ram's remedies against Musammat Tulsa were barred on the 29th of January, 1924, when the plaintiff's suit was instituted. The learned advocate for the appellant has contended that after dispossession the remedy open to Salig Ram was to revive the execution proceedings inasmuch as the auction-sale had been automatically set aside, and that under section 47 of the Code of Civil Procedure he was entitled to proceed against the judgement debtors, and on the ground that the decree had not been in fact satisfied. If an application of this nature could be maintained, it would, however, be an application for execution of the decree which would be governed by article 182 of the Limitation Act, or be an application for revival of execution proceedings which would be governed by the general article 181 of the Act. In either case, the right to apply would accrue on the 31st of July, 1918, when the suit was decreed by the court of first instance and in any case on the 26th of December, 1918, when Salig Ram was actually dispossessed. The mere fact that an appeal from the first court's decree, preferred by Salig Ram himself, was pending in the High Court and was ultimately dismissed, would not prevent the first court's decree from being operative. Once it had been declared by the first court that his judgement-debtor had no saleable interest, the cause of action for making the application certainly arose in favour of Salig Ram. Once time began to run it could not be suspended. As authority for this proposition we may refer to the case of *Juscurn Boid* v. *Pirthichand Lal Choudhury* (1) decided by their Lordships of the Privy Council. At page 679 their Lordships observed that " under the Indian law and procedure an original

(1) (1918) I.L.R., 46 Calc., 670.

decree is not suspended by presentation of an appeal nor is its operation interrupted when the decree is one of dismissal '' and that the cause of action arises on the passing of the first court's decree and is not suspended till that decree is finally affirmed on appeal. It has been urged on behalf of the appellant that inasmuch as the appeal preferred by Chaturbhuj was allowed in part, the decree of the first court was modified, and the case decided by their Lordships of the Privy Council is distinguishable. We, however, think that the two appeals stood on a different footing. In Chaturbhuj's appeal no question of the validity of the decree as regards title was at all raised. He was only challenging the amount of the compensation awarded. The question of title was raised in the appeal preferred by Salig Ram and the case is, therefore, very much similar to the present case. The present suit was not filed till more than three years after the first court's decree and even after the delivery of possession to Chaturbhuj. We must, therefore, hold that the remedies of the creditors, if any, had become barred by time when the present suit was filed. In view of the authorities of this Court the plaintiff has disqualified himself from seeking any relief against Lachhman Das. The result, therefore, is that this appeal must be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Ashworth and Mr. Justice Iqbal Ahmad.

1927
June, 8.

MAQSUD ALI KHAN AND ANOTHER (PLAINTIFFS) v. ABDULLAH KHAN AND OTHERS (DEFENDANTS).*

Mortgage—Prior and subsequent incumbrances—Right of purchaser to set up the prior mortgage which he has paid off against the second mortgagee—Presumption of intention—Mortgage by guardian of minor without necessary sanction—Act No. VIII of 1890 *(Guardians and Wards Act), section* 30*—Civil Procedure Code, order XLI, rule* 33.

The certificated guardian of her minor son mortgaged, without obtaining the sanction of the District Judge, certain shares belonging to both in two villages, *NR* and *A*. These were subject to a prior mortgage. Subsequently the shares in *NR* were sold, with the sanction of the District Judge, and there was left with the purchasers a sufficient amount of the purchase money to pay off both the mortgages. The purchasers paid off the first mortgage, but not the second. The second mortgagee then sued on his mortgage, and the purchasers set up their rights under the first mortgage as a defence. They also pleaded that the second mortgage, having been made without the sanction of the District Judge, was invalid.

Held (1) that in the circumstances the purchasers were not entitled to set up the first mortgage as a shield against the second mortgagee's claim, inasmuch as their intention, at the time of their purchase, was clearly to discharge and extinguish all the incumbrances on the property, *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (1), *Muhammad Sadiq* v. *Ghaus Muhammad* (2) and *Makkhan Lal* v. *Natthi* (3), referred to;

(2) that the purchasers were not estopped from questioning the validity of the second mortgage so far as it affected the minor's share, but if they did so, they were bound to make restitution to the extent that the minor had benefited by the mortgage money. *Nur Bakhsh* v. *Rukum Singh* (4) followed;

(3) that the guardian's share in the property covered by the second mortgage was liable, and

*Second Appeal No. 1021 of 1925, from a decree of Bhagwan Das, Subordinate Judge of Bulandshahr, dated the 26th of February, 1925, reversing a decree of Nawab Hasan, Munsif of Khurja, dated the 19th of March, 1924.

(1) (1884) I.L.R., 10 Calc., 1035. (2) (1910) I.L.R., 33 All., 101.
(3) (1923) 21 A.L.J., 382. (4) (1911) 8 A.L.J., 754.

(4) that, although the mortgagee had not appealed against the decree of the lower appellate court so far as it dismissed his claim altogether as against village *A*, it was nevertheless open to the High Court, while modifying the decree of the lower appellate court in favour of the defendants appellants, to give the plaintiff respondent a decree as against the guardian's share in that village also, in view of order XLI, rule 33, of the Code of Civil Procedure. *Rangam Lal* v. *Jhandu* (1) followed. *Mahomed Khaleel Shirazi* v. *Les Tanneries Lyonnaises* (2), distinguished.

THE facts of the case fully appear from the judgement of the Court.

Pandit *Shiam Krishna Dar*, for the appellants.

Dr. *Kailas Nath Katju*, for the respondents.

ASHWORTH and IQBAL AHMAD, JJ. :—This is a defendants' appeal and arises out of a suit for sale on a mortgage, dated the 4th of August, 1919. The mortgage was executed by Musammat Nazir-un-nissa, defendant No. 1, on her own behalf and on behalf of her minor son Sayed Ahmad Khan, defendant No. 2. The mortgage was for a sum of Rs. 500 and the mortgaged property consisted of shares in two villages, Nagla Rumi and Asafpur, which belonged both to Musammat Nazir-un-nissa and to Sayed Ahmad Khan. Though Musammat Nazir-un-nissa was a certificated guardian of her minor son, she executed the mortgage-deed without taking the permission of the District Judge.

About a month after the execution of the mortgage-deed, viz., on the 10th of September, 1919, Musammat Nazir-un-nissa, with the sanction of the District Judge, sold the share belonging to her and to her minor son in Nagla Rumi to defendants Nos. 3 and 4, who are the appellants before us, and, out of the sale consideration, left with the vendees the amounts due on the basis of a prior mortgage and of the mortgage now in suit for payment to the respective mortgagees. The appellants discharged

(1) (1911) I.L.R., 34 All., 32. (2) (1926) I.L.R., 49 Mad., 435

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the prior mortgage, but did not pay the amount left with them for payment to the plaintiff respondent, and hence the suit giving rise to the present appeal was brought by the plaintiff for recovery of the mortgage debt by sale of the shares in the two villages mortgaged.

The defendants appellants contested the suit mainly on two grounds: (1) that the mortgage, having been executed without the permission of the District Judge, was invalid, and (2) they having discharged the prior mortgage were entitled to set up that mortgage as a shield against the plaintiff's claim.

The trial court held that the mortgage in suit, having been executed without the permission of the District Judge, was ineffective so far as it affected the interest of the minor in the hypothecated property and, therefore, the plaintiff respondent was not entitled to a decree for sale of the minor's share in the two villages and, though the plaintiff was entitled to a decree for sale of Musammat Nazir-un-nissa's share, such a decree could not be granted to the plaintiff, inasmuch as there was nothing on the record to show the extent of Musammat Nazir-un-nissa's share in village Asafpur. But it held that the defendants appellants, having undertaken to discharge the mortgage in suit out of the sale consideration left in their hands, were estopped from disputing the validity of the mortgage, and that the defendants appellants were not entitled to set up the prior mortgage discharged by them as a shield against the plaintiff's claim and, accordingly, it granted a simple money decree to the plaintiff against the defendants appellants.

The defendants appellants filed an appeal in the lower court and the plaintiff filed cross-objections.

The lower appellate court agreed with the trial court in holding that by paying the prior mortgage the defendants appellants did not obtain a priority over the

plaintiff's mortgage and that they were estopped from pleading that the mortgage in suit was invalid. It also agreed with the trial court in holding that the mortgage, having been executed without the permission of the District Judge, was ineffectual to affect adversely the minor's share in village Asafpur and, as the extent of Musammat Nazir-un-nissa's share in that village was not ascertainable, the plaintiff was not entitled to a decree for sale of the share in Asafpur. As a result of these findings, the lower appellate court passed a decree for the full amount claimed by the plaintiff by sale of the share in village Nagla Rumi.

In appeal before us the decrees of the courts below are assailed on the two grounds that were raised by the defendants appellants in the trial court and that have been noted above.

We agree with the courts below in holding that by discharging the prior mortgage the defendants appellants are not entitled to set up the prior mortgage discharged by them as a shield against the plaintiff's claim. As already stated, there were two incumbrances on Nagla Rumi on the date of the purchase made by the appellants. Out of the sale consideration a sufficient amount was left with the appellants for the discharge of both the mortgages. The appellants, having undertaken to pay off both the incumbrances, cannot, by paying off the prior mortgage, step into the shoes of the prior mortgagee and be allowed to claim priority as against the plaintiff respondent. In all cases where a subsequent purchaser claims priority over a puisne mortgagee by reason of his having discharged a prior mortgage, the question is whether or not it was his intention, while discharging the prior mortgage, to keep that mortgage alive as against the puisne mortgage, and in the absence of evidence to the contrary it is presumed that a man acts according to

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his interests; *vide Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (1). But when a purchaser of property, subject to various incumbrances, undertakes to discharge all those incumbrances out of the sale consideration, the presumption is that he intended to discharge and extinguish all the incumbrances over the property purchased by him, and not to keep the prior mortgages alive to be set up as a shield against the claims of the puisne incumbrancers. The reason for this is not far to seek. When the purchaser retains out of the sale consideration an amount enough to discharge all the incumbrances over the property purchased by him, he intends to clear the property of all the incumbrances. The case is otherwise when a purchaser does not undertake to discharge all the incumbrances on the property purchased by him. In such cases, it is clearly to the benefit of the purchaser to keep the prior incumbrance alive and to put the same as a shield against the claim of the puisne incumbrancer, and therefore in such case, in the absence of evidence to the contrary, the presumption is that he did not intend, by discharging the prior mortgage, to extinguish the same but intended to keep it alive. This was the view taken by this Court in the Full Bench decision in *Muhammad Sadiq* v. *Ghaus Muhammad* (2) and in *Makkhan Lal* v. *Natthi* (3). We, therefore, hold that the defendants appellants cannot claim priority as against the plaintiff respondent.

But we are unable to agree with the courts below in holding that it was not open to the defendants appellants to attack the validity of the mortgage in suit. The courts below were of opinion that the appellants, having undertaken to pay off the mortgage in suit out of the sale consideration left with them, were estopped from contesting the validity of the plaintiff's mortgage. In our judge-

(1) (1884) I.L.R., 10 Calc., 1035. (2) (1910) I.L.R., 33 All., 101.
(3) (1923) 21 A.L.J., 382

ment the courts below were wrong in arriving at this conclusion. The mortgage-deed having been executed without the sanction of the District Judge, could, in view of the provisions of section 30 of the Guardians and Wards Act, be avoided by "any person affected thereby." It is clear, therefore, that Sayed Ahmad Khan could avoid the mortgage in suit. The question then remains whether the defendants appellants, who are transferees of Sayed Ahmad Khan's property, have a right to contest the validity of the mortgage in suit. As purchasers of the minor's property the appellants are representatives in interest of the minor. The relief sought in the present suit is that the plaintiff be allowed to recover the mortgage-money by sale of the property purchased by the appellants and, therefore, the mortgage in suit affects the appellants, and they, as representatives in interest of the minor, are entitled, unless estopped from doing so, to question the validity of the plaintiff's mortgage. We are unable to hold that the appellants were estopped from contesting the validity of the plaintiff's mortgage. It is true that the appellants undertook to discharge the plaintiff's mortgage out of the sale consideration retained by them but the plaintiff was not a party to the sale-deed and there was no privity of contract between him and the appellants. The plaintiff had, before the purchase made by the appellants, already advanced the money secured by the mortgage. The appellants did not, by their declaration, act or omission, cause or permit the plaintiff to believe something which the plaintiff did not believe and to act upon such belief, and to change his position in any way. We, therefore, fail to appreciate the grounds on which the courts below held that the appellants were estopped from calling in question the validity of the mortgage in suit.

But even if the minor himself had sought to avoid the mortgage in suit, he could only be allowed to do so

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on condition of making restitution to the extent to which he had benefited by the mortgage, *Nur Bakhsh* v. *Rukum Singh* (1), and, therefore, the appellants, as representatives in interest of the minor, can only be permitted to get rid of the liability created by the mortgage on condition of making restitution to the extent to which the minor benefited by the mortgage money. There is no finding by either of the courts below on the question as to what extent the minor benefited by the mortgage in suit.

Moreover, as already stated, the property mortgaged to the plaintiff comprised shares not only of the minor in the two villages, but of his mother Musammat Nazir-un-nissa as well. The plaintiff respondent is undoubtedly entitled to enforce his mortgage as against the share of Musammat Nazir-un-nissa in both the villages. The lower appellate court granted a decree only for sale of the share in Nagla Rumi and declined to pass a decree for sale of the share of Musammat Nazir-un-nissa in village Asafpur on the ground that there were no materials on the record to determine the extent of her share in that village. The plaintiff has not challenged the decree of the lower appellate court by way of appeal so far as it directs the dismissal of the claim for sale of the share in Asafpur. But there was obvious reason for the plaintiff not to have appealed in this Court, as the probabilities were that the entire decretal amount could be realized by sale of the share in Nagla Rumi. But it is clear that as a result of our findings the plaintiff cannot be held entitled to a decree for the sale of the minor's share in either of the two villages, provided the appellants make restitution to the extent to which the minor benefited by the mortgage in suit. The question then arises, have we jurisdiction, while modifying the decree of the lower appellate court in favour of the appellants, to grant a relief to the plaintiff which was denied to him by the lower appellate

(1) (1911) 8 A.L.J., 754.

court? We think that order XLI, rule 33 of the Code of Civil Procedure vests us with ample jurisdiction to do so. As was pointed out by this Court in the Full Bench decision in *Rangam Lal* v. *Jhandu* (1), "the object of rule 33 is manifestly to enable the court to do complete justice between the parties to the appeal. Where, for example, it is essential in order to grant relief to an appellant that some relief should at the same time be granted to the respondent also, the court may grant relief to the respondent, although he has not filed an appeal or preferred an objection." All the parties to the suit are before us and we can see no justification for not granting to the plaintiff a decree for sale of Musammat Nazir-un-nissa's share in both the villages. By holding that it is open to the appellants to challenge the validity of the mortgage we are denying to the plaintiff respondent the relief granted to him by the lower appellate court. While refusing to enforce the mortgage against the minor's share, we think it consonant with justice to grant the plaintiff a decree for sale of Musammat Nazir-un-nissa's share in the villages mortgaged. Reliance has been placed by the learned counsel for the appellants on the case of *Mahomed Khaleel Shirazi* v. *Les Tanneries Lyonnaises* (2). In our opinion that case is distinguishable. In that case the plaintiff sued two defendants and the suit against one of the defendants was dismissed by the trial court but that defendant was made liable for the plaintiff's costs. The plaintiff did not appeal against the decree of the trial court, and the court of first appeal, on appeal by the defendants, dismissed the claim against both the defendants. The plaintiff thereupon appealed to His Majesty in Council and arrayed both the defendants as respondents to the appeal. It was held by their Lordships of the Privy Council that the plaintiff, not having appealed in the court of first appeal against the decree of the trial court dismissing

(1) (1911) I.L.R., 34 All., 32. (2) (1926) I.L.R., 49 Mad., 435.

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his claim as against one of the defendants, was not entitled in appeal before their Lordships to contest the validity of the decree of the trial court, as against that defendant. In that case the validity of the decree of the trial court not having been assailed in the court of first appeal, their Lordships held that to grant relief to the plaintiff against the defendant who was successful in the trial court would be in effect to allow "an appeal direct to His Majesty in Council from the decree of the trial Judge", and that "order XLI, rule 33 of the Code of Civil Procedure was not intended to apply to such an appeal". This is not so in the present case. The plaintiff in the lower appellate court filed cross-objections against the decree of the trial court, claiming a decree for sale of the shares of Musammat Nazir-un-nissa and of the minor.

For these reasons we hold that Musammat Nazir-un-nissa's share in both the villages is liable to answer the plaintiff's claim.

We cannot dispose of this appeal without having a finding from the lower appellate court on the following points :—

(1) To what extent did the minor Sayed Ahmad Khan benefit by the money advanced under the mortgage in suit?

(2) What is the extent of Musammat Nazir-un-nissa's share in village Asafpur?

Parties will be allowed to adduce additional evidence. The findings must be returned to this Court within two months from to-day's date. On receipt of the findings, ten days will be allowed for filing objections.

Before Mr. Justice Ashworth and Mr. Justice Iqbal Ahmad.

SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS (DEFENDANTS), *v.* RISHI RAM JAGDISH PRASAD (PLAINTIFF).* 1927 *June*, 8.

Railway receipt—Delivery of goods by a railway to a person holding an unendorsed railway receipt—Inference of agency—Act No. IV of 1882 *(Transfer of Property Act), sections* 4 *and* 137*—Act No. IX of* 1872 *(Indian Contract Act), sections* 108 *and* 178.

If a person gives a railway receipt to another person, the inference is that he appoints that other person his agent to take delivery of the goods from the railway company, and the fact that in the rules printed on the railway receipt the railway company states that it will not recognize an agent appointed otherwise than by endorsement will not prevent the railway company from pleading that that other person was in fact an agent and entitled to receive the goods. The rule, however, may operate as an estoppel if the consignor has acted on the belief that the railway company would not recognize as his agent the person to whom the railway receipt has merely been sent without endorsement. *Ramdas Vithaldas* v. *Amerchand and Co.* (1), referred to.

THIS was a suit for damages on account of the alleged wrongful delivery by the Bombay, Baroda and Central India Railway of certain sacks of wheat consigned by the plaintiff at Saharanpur on the 13th of May, 1921, to "self" at Bombay. The goods reached Bombay on the 29th of May, 1921. Meanwhile the plaintiff had sent the railway receipt unendorsed to one Shiv Ram Narain, who endorsed it over to the Prince of Wales' Flour Mills, Bombay. The goods were unloaded on the

*Second Appeal No. 590 of 1925, from a decree of H. Beatty, Additional Judge of Saharanpur, dated the 20th of December, 1924, reversing a decree of Govind Sarup Mathur, Subordinate Judge of Saharanpur, dated the 29th of January, 1923.

(1) (1916) I.L.R., 40 Bom., 630.

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30th of May, 1921, and the endorsee took delivery of them on the 31st. On the same day the plaintiff gave notice to the railway company not to deliver the goods to Shiv Ram Narain or to anyone else than himself; but this notice arrived only after the goods had been delivered.

The trial court dismissed the suit, but on appeal this decision was reversed and the suit decreed. The defendants appealed to the High Court.

Pandit *Uma Shankar Bajpai*, for the appellants.

Dr. *Kailas Nath Katju*, for the respondents.

THE judgement of the Court (ASHWORTH and IQBAL AHMAD, JJ.), after stating the facts as above, thus continued :—

This is a remarkable case. On the facts, as stated, the railway company had a simple reply, and it was as follows : "The plaintiff by sending the railway receipt to Shiv Ram Narain appointed him as his agent for taking delivery of the goods by implication. We delivered the goods to the Prince of Wales' Flour Mills, who was appointed sub-agent of the plaintiff's agent by endorsement of Shiv Ram Narain to the Prince of Wales' Flour Mills on the receipt." This defence was not raised in the written statement in the trial court, and, as it has not been considered in the judgement of either of the two courts, we may presume that it was not raised in argument in either of those two courts. Nor indeed is it taken in any ground of the memorandum of appeal before us. Ground 4 would have been a statement of this plea but for the insertion in that ground of the words "a document of title." The insertion of these words must mean that if the railway receipt had not been a document of title, Shiv Ram Narain would not have been an agent. The plea, therefore, does not raise a defence of mere agency. The

plea was for the first time put forward in argument in our Court.

It would appear to us that the omission of the railway company to take this simple plea was due to misapprehension by their legal advisers of the law. Apparently there was an idea that the condition in the railway receipt that delivery would only be given to an agent appointed by endorsement on the railway receipt debarred the railway company from pleading that Shiv Ram Narain was, in fact and in the eyes of the law, a duly appointed agent of the plaintiff. The condition in the railway receipt could not affect the provisions of the Contract Act. Shiv Ram Narain was clearly appointed an agent for taking delivery of the goods by the act of the plaintiff in sending him the railway receipt even without endorsement. The railway company could take advantage of the fact that Shiv Ram Narain was the plaintiff's agent, notwithstanding the rule that they would not recognize an agent appointed otherwise than by endorsement on the railway receipt. This rule remained a mere threat until it was acted on by the plaintiff or by the railway company. In order to take any advantage of the rule, the plaintiff was bound to show that he had been induced by the rule to believe that the railway company would not treat Shiv Ram Narain as his agent and had altered his conduct by reason of such inducement. In other words, the plaintiff could only rely on the rule in the railway receipt as an estoppel. It does not appear that he even pleaded such an estoppel, much less that he furnished evidence to prove such an estoppel. But he was under no obligation to do either, until the railway company took the plea that Shiv Ram Narain got the goods as his (the plaintiff's) agent. For this reason, we are not prepared to entertain this plea, which has been advanced for the first time in argument in this court.

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Instead of taking this obvious and simple plea, which should have disposed of the case quickly and easily, the railway company took up various untenable pleas. Their main plea was in effect that a railway receipt, even though un-endorsed, is a document of title in the hands of the person to whom it is sent. The lower appellate court was perfectly correct in holding that this would be a dangerous view to take, and that it was impossible to take it, in the absence of evidence to show a mercantile custom that an un-endorsed railway receipt is used in the ordinary course of business as proof of the possession or control of goods. [See sections 4 and 137 of the Transfer of Property Act and the Privy Council decision, *Ramdas Vithaldas* v. *Amerchand and Co.* (1)]. Even assuming that the un-endorsed railway receipt was a document of title, there is no authority for holding that possession of it by a certain person justifies another person in regarding the possessor as a duly appointed agent. Under sections 108 and 178 of the Contract Act a document of title is a negotiable instrument to the extent that the possessor of it can give a valid title of the goods represented thereby to a vendee or a pledgee. The principle underlying these sections is that a *bonâ fide* transferee for value may rely on delivery of a document of title as proof that the person delivering it is entitled to transfer the goods represented by the document. The principle cannot operate in favour of a mere agent in any way.

Another plea taken up was that the plaintiff was estopped from denying that Shiv Ram Narain was his agent, by sending Shiv Ram Narain the railway receipt. When a person's act has a certain legal effect, it is desperate to plead that that act operates by estoppel. The act operated directly of itself and not indirectly by misleading the railway company. Moreover the railway

(1) (1916) I.L.R., 40 Bom., 630.

company, up till the time of the delivery of the goods, were not aware that the plaintiff had given Shiv Ram Narain the railway receipt. The mere fact that Shiv Ram Narain endorsed the railway receipt to his sub-agent was no proof that he had got the railway receipt from the plaintiff.

The plea of contributory negligence was not advanced in this Court, and though admitted by the trial court, was obviously irrelevant and untenable.

For the above reasons we are constrained to uphold the decision of the lower appellate court, though on different grounds. If the case had been properly pleaded, it is probable that the railway company would have been successful. At any rate we wish to make it clear that if a person gives a railway receipt to another person, the inference is that he appoints that other person his agent to take delivery of the goods from the railway company, and the fact that in the rules printed on the railway receipt the railway company states that it will not recognize an agent appointed otherwise than by endorsement, will not prevent the railway company from pleading that that other person was in fact an agent and entitled to receive the goods. The rule, however, may operate as an estoppel if the consignor has acted on the belief that the railway company would not recognize as his agent the person to whom the railway receipt has merely been sent without endorsement.

For the above reasons we dismiss this appeal with costs.

Appeal dismissed.

Before Justice Sir Cecil Walsh and Mr. Justice Ashworth.

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June, 9.

HUKUM CHAND AND OTHERS (PLAINTIFFS) *v.* SITAL PRASAD AND OTHERS (DEFENDANTS).*

Hindu law—Jains—Special custom empowering a widow to deal at will with the property of her late husband.—Stridhan.

According to the Hindu law of the *Mitakshara* school, there is no distinction between *stridhan* and "property that a widow can deal with at her pleasure."

In the case of a Jain family, subject in other respects to the law of the *Mitakshara*, a custom was found by which the widow of a separated Jain could deal with the property of her late husband in any way she pleased.

Held that such property was the widow's *stridhan* and was governed by the rules of descent applicable to *stridhan* property.

Debi Mangal Prasad Singh v. *Mahadeo Prasad* (1); *Sheo Shankar Lal* v. *Debi Sahai* (2); *Lakshmi Narain Misir* v. *Musammat Sumarti Kunwar* (3); *Sheo Singh Rai* v. *Dakho* (4), and *Ram Kali* v. *Gopal Dei* (5), referred to.

THESE were two appeals arising out of two suits brought by the plaintiffs appellants against the respondents for possession of certain property. The property belonged to one Amolak Ram, who died in 1879, leaving a widow Musammat Bir Kunwar. She died in 1881, leaving three daughters. Two of these daughters jointly in 1882 alienated a portion of the property in suit. The third daughter in 1885 alienated the rest of the property in suit. All the three daughters having died, the plaintiffs claimed that they were entitled to the property as reversionary heirs of Amolak Ram, and that the alienations mentioned were ineffective against them now that the daughters were dead.

*Second Appeal No. 515 of 1925, from a decree of H. Beatty, Additional Judge of Saharanpur, dated the 21st of January, 1925, reversing a decree of Govind Sarup Mathur, Subordinate Judge of Saharanpur, dated the 19th of March, 1924.

(1) (1912) I.L.R., 34 All., 235. (2) (1903) I.L.R., 25 All., 468.
(3) (1924) I.L.R., 46 All., 439. (4) (1878) I.L.R., 1 All., 688.
(5) (1926) I.L.R., 48 All., 648.

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Both suits were dismissed by the District Judge in appeal, and the plaintiff appealed to the High Court.

Babu *Piari Lal Banerji*, for the appellants.

Dr. *Kailas Nath Katju*, for the respondents.

The judgement of ASHWORTH, J., after reciting the facts as above, thus continued:

THE appeal No. 546 deals with the original suit No. 164 of 1923. In that suit the District Judge held that the alienation of 1882 by Musammat Lachhmi and Musammat Barfi was for necessity. This was a finding of fact, and the appellants have not been able to show that it was based on any mistake of law. Their suit, therefore, No. 164, must fail, and the appeal fails, in my opinion, on the ground that the question is concluded by a finding of fact. I may mention that it was in this suit that the question of the suit being barred under order II, rule 2, arose. It does not seem to me necessary to decide this point, but if it had been necessary I would have concurred with the view of my learned brother.

As regards the appeal No. 545, which is in respect of suit No. 131, it was necessary for the plaintiffs to prove that, on the death of the last of the three daughters of Musammat Bir Kunwar, they were entitled to the estate of Amolak Ram. One amongst other pleas taken by the defendant was that Amolak Ram having been a Jain, and this property being his self-acquired property, his widow Musammat Bir Kunwar got an absolute estate in that property by Jain custom. Both the lower courts have found that the custom was proved, and the *extent* of the custom as found by the trial court was this. The custom gave the widow absolute right to transfer the property derived from her husband in her life-time, but, on the other hand, if not transferred the property would descend as the estate of her husband and not as

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the *stridhan* of the widow. The lower appellate court accepted this view. It went on, however, to hold that the widow had made a will conferring an absolute estate on her three daughters. I concur with my learned brother that there was no evidence by which the making of an oral will by Musammat Bir Kunwar or the terms of such oral will, if one was made, could be held proved. The document relied upon was the award of an arbitrator, who was appointed by the three daughters of Musammat Bir Kunwar to settle their *inter se* claims on the assumption of a will. The arbitrator said in his award that he had ascertained by inquiry the terms of the will. Now if the arbitrator had been alive and had come into court, it appears to me that his evidence would have been inadmissible as mere hearsay evidence. I cannot think that, because this hearsay evidence has been expressed by him in an old document it ceases to have to be regarded as mere hearsay evidence. There are only two questions with which I consider it now necessary to deal in this appeal. One is whether under Jain custom Musammat Bir Kunwar inherited this property as her *stridhan* or whether, for the purposes of succession to her, she must be regarded as only having had a widow's estate, notwithstanding that according to the Jain custom she could before her death have disposed of it as she liked.

The contention of the appellants is that the *Mitakshara* makes no distinction between property of which a woman can dispose as she likes and *stridhan* property. It considers the two expressions synonymous. For the respondents it is maintained that it is possible for a widow to have a widow's estate in her husband's property and yet, by reason of a custom such as the one now set up, to have a right of absolute disposal during her life-time. It is pointed out that, according to the Bombay school, property inherited by a woman from a

male may be, if inherited in one way, her *stridhan* and if in another way, not her *stridhan*. Reference is made to Mulla's Hindu Law, 5th edition, page 134. The following decisions have been invoked in favour of each contention, *e.g.*, *Debi Mangal Prasad Singh* v. *Mahadeo Prasad* (1), *Sheo Shankar Lal* v. *Debi Sahai* (2) and *Lakshmi Narain Misir* v. *Musammat Sumarti Kunwar* (3).

It appears to me that the matter has to be looked at in the following way. The family in question, though a Jain family, was governed by the *Mitakshara* law except so far as that law was varied by custom. In order to find out the custom set up we must refer to the Privy Council decision in *Sheo Singh Rai* v. *Dakho* (4). In this decision is set forth at length the evidence on which their Lordships came to the conclusion that the custom now set up was established. On page 700 a representative body of the leading members of the Jain community expressed the opinion that, in the absence of any son, a Jain widow succeeds to the estate of her husband, movable and immovable, in absolute right, (ii) that she can deal with it at pleasure and without restriction, and (iii) that she can adopt her daughter's son without the authority of her husband, and that such adopted son would succeed to her deceased husband's estate. The last five words "to her deceased husband's estate" appear to me to be merely descriptive and cannot be invoked to mean that the investigators of the custom considered that the widow would hold the property as her husband's estate. Even if they could be construed as having this meaning, they would merely represent an incidental and not authoritative view, it being no duty of the investigators to determine the implication of the facts they ascertained. On the other hand, in this statement of the custom, a distinction was made between the

(1) (1912) I.L.R., 34 All., 235.
(2) (1903) I.L.R., 25 All., 468.
(3) (1924) I.L.R., 46 All., 439.
(4) (1878) I.L.R., 1 All., 688.

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finding that the widow succeeded in absolute right and the finding that she could deal with the estate at pleasure and without restriction. I should deem the first finding as meaning that the property was taken by her as her *stridhan*. Apart from this, whatever distinction other schools may make between property with which the widow can deal at her will and property which is her *stridhan*, because the property comes to her in various ways, I am not able to hold, after considering the various decisions brought to my notice, that according to the *Mitakshara* school any distinction is made between the word *stridhan* and the expression "property that the widow can deal with at pleasure". The fact that other schools make such a distinction will not affect a consideration of the law according to the *Mitakshara* school. The *dictum* in various text-books and decisions as to *Mitakshara* law "that inherited property is never *stridhan*" is inapplicable to that law when overlaid by a Jain custom such as the one in question, no such custom being in contemplation of these authorities when expressing the *dictum*. Consequently when a custom is proved as affecting persons otherwise subject to the *Mitakshara* school and that custom is said to confer on the widow a right to deal with property at her will, I consider that this must mean that the property is her *stridhan* and will devolve as her *stridhan*. In this view of the case, it is admitted that the plaintiffs can have no present right in the property. On the death of Musammmat Bir Kunwar the property passed to her daughters, and on the death of the last of them it would pass to her grand-daughters and not to her grandsons.

It is said, however, that we are bound by the Privy Council decision reported in *Sheo Shankar Lal* v. *Debi Sahai* (1), and that that decision decides that under the ordinary rule of inheritance the grandson of a woman

(1) (1903) I.L.R., 25 All., 468.

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holding property as her *stridhan* will succeed in preference to her grand-daughter. Whether this is so, is the second question with which I have to deal. I consider that for the reasons stated in *Ram Kali* v. *Gopal Dei* (1), the Privy Council decision need not be held to lay down the law on this subject. A reference to the Privy Council decision relied upon will show that their Lordships only considered one question of law. This question they have propounded at pages 468 and 469 in the following words :—

Ashworth J.

"This involved the question of law whether according to Benares law, by which the family was governed, the property on the death of Jagarnath descended as *stridhan* and went to her daughter, or whether it lost its character of *stridhan* and descended according to the ordinary rule of inheritance to her sons, the plaintiffs".

It is obvious that the legal question arising might have been equally well stated even if the words "to her sons, the plaintiffs" had been omitted. They were added on the obvious assumption that this was the law. The respondents in that case were not represented, and thus had no opportunity of questioning the proposition involved. Nor does it appear that at any stage of the suit was an issue framed on the matter. If it was, there was no appeal on this issue. The assumption of a certain view of law in a judgement of the Privy Council for the purpose of deciding another question cannot, in my opinion, be regarded as a binding decision. It has even less force than an *obiter dictum;* for it is not necessary to prove or decide what is admitted.

For the above reasons, I would concur with my learned brother in dismissing appeal No. 546, but on the other hand I do not concur in allowing appeal No. 545. I would dismiss that appeal also in concurrence with the District Judge but on a different ground.

(1) (1926) I.L.R., 48 All., 648 (652).

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HUKUM CHAND v. SITAL PRASAD.

[WALSH, J. concurred, with hesitation, in the order proposed.]

BY THE COURT.—Appeals Nos. 545 and 546 of 1925 are dismissed with costs.

Appeal dismissed.

Before Mr. Justice Sulaiman and Mr. Justice Banerji.

1927
June, 9.

KANHAIYA LAL AND OTHERS (OBJECTORS) *v.* GENDO (PETITIONER)*

Costs—Taxation of—Contested application for probate before a District Judge—High Court Rules, 1898, *chapter XVI, rule* 2—*General Rules (Civil), chapter XXI, rules* 22 *and* 26.

Held that the rule applicable to the taxation of costs in a contested application for probate before a District Judge is rule 26 of chapter XXI of the General Rules (Civil) for subordinate civil courts. Such a proceeding is not a "suit" but a "miscellaneous judicial case." *Sundrabai Saheb* v. *The Collector of Belgaum* (1) and *Baijnath Prasad* v. *Sham Sundar Kuar* (2), referred to.

The facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Pandit *Shiam Krishna Dar*, for the appellants.

Munshi *Narain Prasad Ashthana*, for the respondent.

SULAIMAN and BANERJI, JJ.:—This appeal arises out of a probate proceeding and relates to the costs which have been taxed in the decree of the court below. It raises a question of principle affecting the practice in subordinate courts. An application for probate was made on the 18th of January, 1924, and on the 1st of March a caveat was entered. On the 30th of August

*First Appeal No. 479 of 1924, from a decree of A. G. P. Pullan, District Judge of Agra, dated the 30th of August, 1924.

(1) (1908) I.L.R., 33 Bom., 256. (2) (1913) I.L.R., 41 Calc., 637.

evidence was recorded and probate was ordered to be granted to the applicant. The office of the District Judge taxed the costs on the scale fixed for original suits. An objection was raised by the caveator to the amount taxed, but the learned Judge, relying upon chapter XVI, rule 2, of the High Court Rules, dismissed the objection.

In our opinion chapter XVI, rule 2, of the High Court Rules had no direct application to the case at all. The suits and applications spoken of there refer to suits and applications which are tried on the original side by the High Court itself and do not refer to suits tried by subordinate courts. The case had to be decided in accordance with chapter XXI of the General Rules (Civil) for subordinate civil courts. A graduated scale is prescribed for calculating fees in "suits, or appeals from original and appellate decrees in suits for money, effects or other personal property, or for land or other immovable property of any description, when such suits or appeals are decided on the merits after a contest." On the other hand, rule 26 prescribes a different scale for miscellaneous judicial cases. It is conceded that if rule 22 is not applicable then the only other rule which would apply would be rule 26.

Rule 22 refers to suits and to appeals. It does not refer to applications. If therefore the probate proceedings are a suit, rule 22 would apply.

Under the Probate and Administration Act of 1881, which was in force when this case was decided by the court below, applications for probate are throughout the Act called "petitions" and the applicant is called "petitioner." Section 83 of the Act provides that in any case in which there is contention, the proceeding shall take, as nearly as may be, the form of a suit, according to the provisions of the Code of Civil Procedure, in which the petitioner for probate shall be

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the plaintiff, and the person who may have appeared as aforesaid to oppose the grant shall be the defendant. In our opinion this section, instead of helping the respondent, is really against him, for it clearly implies that the proceeding is not itself a suit but is to take, as nearly as may be, the form of a suit. If the proceeding were itself a suit, there would be no necessity to say that it should take the form of a suit when there is a contention. In the case of *Sundrabai Saheb* v. *The Collector of Belgaum* (1) a Bench of the Bombay High Court held that the preceedings in an administration case were not a suit. A similar view was expressed in the case of *Baijnath Prasad* v. *Sham Sundar Kuar* (2).

This view is further strengthened by the circumstance that in the corresponding High Court Rules, chapter XVI, rule 2, the language is "in a suit and in an appeal from the original decree in a suit for money, effects or other personal property, or for land and other immovable property, or for specific performance, or for an injunction, or for damages in a suit under section 42 of Act I of 1877, and in a contested application for probate or letters of administration." It is obvious that a contested application for probate is mentioned separately and is not considered to be included in the expression " in a suit." It was apparently considered that in a contested probate proceeding in the High Court the scale of counsel's fee should be the same as that of original suits, and it is on that account that such an application was expressly mentioned in rule 2.

We are therefore of opinion that the rule applicable to the case was rule 26 of chapter XXI, General Rules (Civil) for civil courts and not rule 22, and that the taxation of the costs was not correct.

(1) (1908) I.L.R., 33 Bom., 256 (2) (1913) I.L.R., 41 Calc., 637.

The last ground of appeal is based on the circumstance that the applicant engaged a vakil on the 26th of January, 1924, who filed a certificate of fees on the 1st of March, 1924, on which date caveat was entered. Later on, on the 30th fo August, 1924, he wished to offer himself as a witness and asked the permission of the court to do so. The permission having been granted, he was examined as a witness. He did not however subsequently take any part in the conduct of the proceedings. The contention on behalf of the appellant is that his certificate of fee should not be taken into account.

It is likely that the pleader did not expect that the application would be contested and he would have to appear as a witness because he had been consulted in the preparation of the draft. Had he expected that his evidence would be required, we assume that he would have considered it undesirable to agree to be engaged in the case. Under the circumstances we are of opinion that the certificate filed by him before he was examined as a witness cannot be ignored, especially when permission was granted to him by the Judge to give evidence in the case. The appeal is accordingly allowed and the amount of costs entered in the decree of the court below varied, so as to bring it in harmony with the scale prescribed in rule 26. The appellant will have the costs of this appeal. The costs of this appeal, however, will have to be calculated in accordance with the High Court Rules.

Appeal allowed.

APPELLATE CRIMINAL.

Before Justice Sir Cecil Walsh and Mr. Justice Kendall.

1927
June, 15.

EMPEROR *v.* BISHUN DATT AND ANOTHER.*

Criminal Procedure Code, section 164—*Act No. I of* 1872 (*Indian Evidence Act*), *sections* 145 *and* 155—*Limitations of use of statement made under section* 164.

A previous statement of a witness recorded under section 164 of the Code of Criminal Procedure can be used as provided for by sections 145 and 155 of the Indian Evidence Act, 1872; but it cannot be used as substantive evidence of the facts deposed to therein.

Bomanji Cowasjee v. *The Chief Judge and the Judges of the Chief Court of Lower Burma* (1), and *Emperor* v. *Cherath Choyi Kutti* (2), referred to. *Puttu* v. *King-Emperor* (3), followed.

THE facts of this case sufficiently appear from the judgement of the Court.

Munshi *Kumuda Prasad* and Pandit *M. N. Raina*, for the appellants.

The Government Advocate (Pandit *Uma Shankar Bajpai*), for the Crown.

WALSH and KENDALL, JJ. :—In this case, which is an appeal by two men who have been condemned to death under section 302, Indian Penal Code, a serious question arises as to the admissibility, for the purpose of proving facts against the accused, of certain statements, which were undoubtedly admissible for the purpose of impeaching the credit of some of the witnesses who were called. The matter is of importance and not free from difficulty, and there appears to be no decisive authority in this High Court. It is absolutely necessary for us to decide the point as a point of law, because if, as is the case, we

*Criminal Appeal No. 445 of 1927, from an order of Piare Lal, Additional Sessions Judge of Kumaun, dated the 15th of April, 1927.

(1) (1906) L.R., 34 I.A., 55. (2) (1902) I.L.R., 26 Mad., 191.
(3) (1914) 17 Oudh Cases, 363.

are of opinion that these statements ought not to be used as evidence of the facts contained in them against the accused, we shall have to decide the appeal upon the other evidence in the case, the learned Sessions Judge having taken these statements into account in deciding to convict the appellants.

The matter arises in this way. A witness was called at sessions by the prosecution for the purpose of proving a particular fact against one of the accused, which could be used to corroborate a confession of his co-accused. The witness said that he knew nothing about it at all. He was then asked if he had not made a statement under section 164 of the Code of Criminal Procedure. He undoubtedly had. Before the case was initiated in the court of the Magistrate who committed it for trial, the witness had been put on oath before a Magistrate and had made a statement of what he alleged to be his knowledge of the relevant facts, containing certain definite allegations against the accused. He admitted at sessions having made the statement—indeed he could hardly do otherwise—as it was made on oath and taken down in writing. He then alleged that it was false and that he had been tutored to make it by the police.

The question is whether these previous statements, and the evidence which they contain against the accused, can be used against the accused.

The two relevant sections appear to be sections 145 and 155 of the Evidence Act. Section 145 permits a witness to be cross-examined as to a previous statement made by him which has been reduced to writing, and to be contradicted by such writing which can be proved for the purpose of contradicting him. Section 155 enables his credit to be impeached in a manner therein provided "by proof" (to quote sub-section 3) "of former statements inconsistent with any part of his evidence which

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is liable to be contradicted." It follows therefore that in this case the statement made under section 164 of the Code of Criminal Procedure was properly admitted and did in fact impeach the credit of the witness. The question is whether its legitimate use can be carried beyond that stage. If it is to be used as the learned Sessions Judge has used it, then it is adding something to what the witness has not said at sessions, and it is not merely impeaching his testimony, but supplementing it. We are of opinion that the sections do not justify this procedure. It is necessary to refer to only three authorities. In the case of *Bomanjee Cowasjee* v. *The Chief Judge and the Judges of the Chief Court of Lower Burma* (1) a barrister was charged with improper conduct as a prosecuting counsel. One of the charges was that he had suggested bribery to somebody connected with the case. The prosecutor denied that the barrister had advised him to bribe. The prosecutor was cross-examined as to whether he had not said to another advocate engaged in the case that the advocate accused had suggested bribery to him. The prosecutor denied it. The barrister was then called to prove that the witness had made a statement to him of that fact. The Privy Council held that that evidence by the barrister was insufficient to prove the facts which had been found by the courts below, and could not avail to contradict the prosecutor's sworn denial. In other words, they held that even though the court believed the barrister and did not believe the prosecutor, there would still be no evidence by the prosecutor that the accused had advised him to bribe. That case is not on all fours with the present case, because in that case that witness, whose credit was impeached, had never given affirmative evidence of the fact which was sought to be proved. The affirmative evidence came from the mouth of the witness who was called to contradict him. In this case the

(1) (1906) L.R., 34 Ind. App., 55.

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witness admits having made the statement on oath, and therefore this case is stronger, and the decision of the Privy Council is not decisive and, if it stood alone, we might consider that the distinction entitled us to depart from the rule there laid down. But a single Judge in the case of *Emperor* v. *Cherath Choyi Kuti* (1) has held generally that previous statements used under section 155, subsection 3, for discrediting the evidence of a witness, cannot be used as substantive evidence against the accused. In that case they had been rejected at sessions, and the High Court upheld that rejection on appeal by Government. We adopt and follow the very clear and reasoned decision upon the point by our brother LINDSAY, when sitting as Judicial Commissioner of Oudh, in the case of *Puttu* v. *King-Emperor* (2). With reference to similar statements taken under section 164, he says :

" They were, it is true, admissible under the provisions of sections 145 and 155 of the Indian Evidence Act for the purpose of contradicting the statements made by these witnesses in court, but they were not admissible for any other purpose. They were statements which were made behind the back of the accused, and which he had no opportunity of cross-examining. They were not statements to which the provisions of section 288 of the Code of Criminal Procedure applied. That section enacts a special provision for the admission against the accused at a sessions trial of a statement made by a witness in the court of the Committing Magistrate after the accused has had a proper opportunity for cross-examination."

We agree with these observations and with that decision, and we hold that the Sessions Judge ought not to have relied upon this statement as evidence against the accused, and the appeal must be decided upon the balance of the evidence.

[The judgement then discussed the other evidence and dismissed the appeal.]

(1) (1902) I.L.R., 26 Mad., 191. (2) (1914) 17 Oudh Cases, 363.

APPELLATE CIVIL.

Before Mr. Justice Ashworth and Mr. Justice Sen.

1927
July, 15.

SHEO NARAIN (PLAINTIFF) *v.* EAST INDIAN RAILWAY (DEFENDANT).*

Act No. IX of 1890 (*Indian Railways Act*), *section* 76—*Risk-note form B—Negligence—Burden of proof—Act No. IX of* 1872 (*Indian Contract Act*), *sections* 151, 152 *and* 160.

Held, on a construction of "risk-note form B" that, where a plaintiff is claiming damages from a railway company for the loss of entire packages belonging to one consignment, after the plaintiff has given evidence of the loss, it is for the defendant company to show that there has been no wilful neglect on their part, and by "wilful neglect" is meant the failure to take such precautions as a prudent man would in respect of his own goods take to provide against such loss or theft as a prudent man would contemplate as not merely possible, but as likely. *East Indian Railway Co.* v. *Nathmal Behari Lal* (1), and *East Indian Railway Co.* v. *Sri Ram Mahadeo* (2), not followed. *H. C. Smith, Ltd.*, v. *Great Western Railway Co.* (3), distinguished.

THE facts of this case sufficiently appear from the judgement of the Court.

Munshi *Damodar Das*, for the appellant.

Pandit *Ladli Prasad Zutshi*, for the respondent.

ASHWORTH and SEN, JJ. :—This second appeal arises out of a suit brought by the plaintiff appellant, Sheo Narain, against the East Indian Railway Company for damages on account of the failure of the defendant to deliver a consignment of *ghee* in its entirety. The consignment consisted of

*Second Appeal No. 1337 of 1925, from a decree of Muhammad Saiduddin, Second Additional Subordinate Judge of Allahabad, dated the 31st of March, 1925, modifying a decree of Muhammad Taqi Khan, Munsif of Allahabad West, dated the 17th of December, 1924.

(1) (1917) I.L.R., 39 All., 418. (2) (1923) I.L.R., 46 All., 125
(3) (1922) 1 A.C., 178.

some bags of rice and 185 tins of *ghee*, each containing 20 seers, despatched at Maihar for delivery to the plaintiff at Allahabad. It is common ground that the consignment was in a waggon that arrived safely at Allahabad with the seals intact on the 22nd of April, 1923. The evidence shows that the waggon was in the goods shed on the 27th of April, 1923: it is not clear whether it was kept outside up to that date. On that date the *chaukidar* reported that its seals were broken. The goods were checked on the 2nd of May, 1923, and found short. They were delivered to the plaintiff on the 2nd of May, 1923. The shortage was as follows: 13 tins were missing and in 3 other tins the amount of *ghee* was only 8 seers instead of 20 seers. The value claimed was Rs. 561-5-0. The defence was that the consignment was despatched under risk-note form B which protected the railway company from any loss occasioned otherwise than by wilful neglect, and that there had been no wilful neglect on the part of the railway company or on the part of its servants. The trial court held that in the circumstances of the case it was for the defendant to prove that the railway company had taken such care of the goods in dispute as a man of ordinary prudence would have taken. It found that the theft of the *ghee* occurred after arrival at Allahabad station and came to the conclusion that it was due to theft by the railway servants. It gave a decree for the loss of the contents of the 13 tins of *ghee* but dismissed the claim as to the shortage in the three tins, holding that the railway company was protected by the risk-note from responsibility for this shortage.

In appeal, the Additional Subordinate Judge of Allahabad set aside the decree of the trial court and dismissed the suit on the ground that the burden of

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proving wiful neglect or theft by the railway administration or its servants was on the plaintiff and he had failed to sustain this burden. The plaintiff appealed.

In this second appeal the six grounds taken in the memorandum of appeal have not been argued. The only ground taken is that the lower appellate court came to a wrong conclusion by incorrectly placing the burden of proof of wilful neglect on the plaintiff. There is, however, one ground, namely, the fifth in the memorandum of appeal, which takes up the broad plea that the defendant was not protected by the risk-note. The counsel for the defendant respondent raised no objection to the appeal being argued on the lines stated. Accordingly we think it permissible to decide this appeal on the question whether the lower appellate court's dismissal of the suit was vitiated by incorrect placing of the burden of proof. At the same time we would point out the extreme risk run by an appellant in formulating the grounds of appeal absolutely at random and then asking the court to interfere with the decree of the lower appellate court on a different ground.

Under section 160 of the Contract Act the railway company, as bailee, was bound to deliver the goods consigned in the condition in which they were consigned, but this duty was subject to certain exceptions. One was that the railway company was only bound to take as much care of the goods as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality and value as the goods consigned, (see section 151 of the Contract Act). It was not responsible for any loss, destruction or deterioration if this amount of care was taken (see

section 152). Now, this being an exception, the burden of proving the exception was on the railway company. Moreover, the circumstances in which the loss and damage occurred were especially within the knowledge of the railway company. So, under the ordinary laws of evidence, the burden of proving that sufficient care was taken was on the railway company. To make this clear beyond all doubt, section 76 of the Indian Railways Act (IX of 1890) enacts that in any suit for loss, destruction etc., of goods, it shall not be necessary for the plaintiff to prove how the loss or destruction was caused. It has been argued, however, by respondent's counsel that the burden of proof placed on the railway company by these provisions of the law was shifted by the fact that the plaintiff signed what is known as risk-note form B. This risk-note amounted to a contract that—

> "the consignor would not hold the railway responsible for any loss except the loss of a complete consignment or of one or more complete packages forming part of a consignment due either to the wilful neglect of the railway administration or to theft by or to the wilful neglect of its servants, etc".

It also provided that the term "wilful neglect" should not be held to include fire, robbery from a running train or any other unforeseen event or accident. We fail to see how this risk-note could shift the burden of proof. Its only effect was to limit the extent of the railway's responsibility. We hold, therefore, that the lower appellate court was wrong in placing on the plaintiff the burden of proving wilful neglect. It was for the railway company to disclose the facts and show that they were inconsistent with wilful neglect. The counsel for the respondent admitted, indeed he volunteered, that there was little information disclosed by the evidence of the facts.

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He said that the goods train was kept in a siding outside the goods-shed for some time until there was room in the goods-shed for unloading the train. It is sufficient to say that the evidence failed entirely to show what were the risks of theft from the waggon and what precautions were taken to meet those risks.

We would here state that we were not referred in the argument of this appeal to any evidence. We accordingly had to accept what was stated in the judgements of the courts below as mainly correct.

We find then that the evidence did not suffice to justify a finding that there had been no wilful neglect by the railway company. At one time in his argument in this appeal counsel for the respondent seemed to suggest that the fact that there was a *chaukidar* was sufficient to show that there was no wilful neglect. The mere appointment of a *chaukidar* would not appear to us to exclude the possibility of wilful neglect. Again, respondent's counsel argued that wilful neglect meant neglect intended to bring about a theft. This appears to us a desperate argument. The definition of " wilful neglect " in the risk-note appears to us to mean—

> "the failure to take such precautions as a prudent man would in respect of his own goods take to provide against such loss or theft as a prudent man would contemplate as not merely possible but as likely",

fire and robbery from a running train being given as instances of events so exceptional or impossible to guard against as to justify absence of precautions. It is clear that theft from a waggon within the railway station, when the waggon is merely sealed, was a very probable contingency in the absence of definite precautions. We know vaguely the risks, but we do not know the precautions, from the evidence; and the railway company must suffer for their failure to prove

these precautions. It may be that the railway company could prove such precautions or even that they have proved such precautions, but the evidence has not been printed and their counsel has not indicated or attempted to indicate any, beyond saying that there was a *chaukidar* there.

It is urged, however, by counsel for the railway company that there is strong authority for the view that under the terms of the risk-note the burden of proving wilful neglect was on the plaintiff. The risk-note runs as follows :—

"I, the undersigned, do in consideration of such lower charge agree and undertake to hold the said railway administration . . . . . harmless and free from all responsibility for any loss, destruction, or deterioration of, or damage to the said consignment, from any cause whatever except for the loss of a complete consignment or of one or more complete packages forming part of a consignment due either to the wilful neglect of the railway administration, or to theft by or to the wilful neglect of its servants . . . . . employed by them before, during and after transit over the said railway . . . . : provided the term "wilful neglect" be not held to include fire, robbery from a running train or any other unforeseen event or accident."

There is nothing in these terms which purports to govern the question of burden of proof. The burden of proof will, therefore, be the same as if the risk-note had not been signed and, as shown above, we are of the opinion that the burden of proving proper precautions rests, apart from the risk-note, on the railway company. We have, however, been referred to the decision of the House of Lords, *H. C. Smith, Ltd.*, v. *Great Western Railway Co.*, (1). We would distinguish this decision on the ground that it dealt with a risk-note containing different terms from risk-note form B. In the risk-note considered by their Lordships the consignor relieved the railway company from all liability for

(1) (1922) 1 A.C., 178 (183).

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loss, damage, etc., except by the proof that such loss, damage, etc., arose from the wilful misconduct of their servants. Their Lordships held that these words amounted to a contract by the consignor that he would not be entitled to compensation unless he proved the wilful misconduct of the railway company. Lord BUCKMASTER made the following remarks :—

"It is perfectly true that this results in holding that the apparent protection afforded to the trader is really illusory; it practically gives him no protection at all, for it is often impossible for a trader to know what it is that has caused the loss of his goods.....The explanation of the loss is often within the exclusive knowledge of the railway company, and for the trader to be compelled to prove that it was due to wilful misconduct on the part of the railway company's servants, is to call upon him to establish something which it may be almost impossible for him to prove. Nonetheless, that is the burden that he has undertaken".

It will be seen that the risk-note before their Lordships was one which required positive proof of wilful misconduct. Their Lordships, therefore, in effect, held, that the plaintiff could not rely upon mere negative proof of want of sufficient precautions. The risk-note before us, form B, says nothing about proof, and on this ground we would distinguish it. We may mention that recently a new form of risk-note, form H, has been issued by the railway company to take the place of risk-note form B. That risk-note provides for the consignor holding the railway administration free from all responsibility . . . . . " except upon proof that such loss, destruction, etc., arose from the misconduct of the railway administration servants." Apparently this form was issued with the specific purpose of making the judgement of the House of Lords applicable. This conjecture is strengthened by the fact that in the new form H an endeavour has been made to meet the objection of their Lordships that the risk-note was

unfair to the tradesmen, inasmuch as the risk-note also contains an obligation on the railway company that the railway administration shall be bound to disclose their dealings with the packages in transit and to give evidence thereof. It appears then that it was recognized by the Government (which is required to approve of the form of risk-notes) when approving the new rule, that the House of Lords' decision could not be invoked in favour of the railway company under the old form B. Then we have a two-Judge decision of this Court, *East Indian Railway Company* v. *Nathmal Behari Lal* (1), where it was held that under risk-note B " it lies upon the consignor claiming damages to show that the loss was occasioned by the theft or wilful neglect of the company's servants." In this case there was a theft between the last station but one before Cawnpore and Cawnpore on a running train. The evidence in this case justified a finding on the facts that there was no wilful neglect to take the necessary precautions by the railway company. All the usual precautions were proved to have been taken. The decision would, therefore, appear to have been justified on the facts, without invoking the reason that the burden of proof lay on the plaintiff. So far as that ruling is authority for holding that the burden of proof, in the absence of any evidence as to precautions being taken, should be placed on the consignor, we are not disposed to agree with it. Then we have a single Judge decision of this Court, *East Indian Railway Company* v. *Sri Ram Mahadeo* (2). This decision was based on the case of *East Indian Railway Company* v. *Nathmal Behari Lal* (1) and on the House of Lords' decision referred to. As we are not disposed to follow the former and have distinguished the latter, this decision of a single Judge should not, in our opinion, be followed. There are many decisions

(1) (1917) I.L.R., 39 All., 418. (2) (1923) I.L.R., 46 All., 125.

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which impose on the plaintiff, in such a case as this, the initial burden of proof, but differ as to the exact amount of proof which will shift the burden of proof. We agree that it is for the plaintiff to prove non-delivery, and so far the initial burden of proof is on the plaintiff. On such proof the burden would, in our opinion, shift to the railway company to show that they took reasonable precautions. A very little evidence in this direction may again shift the burden of proof. In the present case counsel for the railway company has only pointed to the fact that there was a *chaukidar* at the Allahabad railway station. This, as stated above, we do not consider to be sufficient evidence to shift the burden of proof.

We hold, therefore, that the lower court was wrong in putting the burden of proof on to the plaintiff. On this ground we set aside the decree of the lower appellate court and restore that of the trial court. The plaintiff will get his costs in this and in the lower appellate court.

Appeal allowed.

REVISIONAL CIVIL.

Before Mr. Justice Dalal.

1927
June, 17.

SURAJ PRASAD AND ANOTHER (APPLICANTS) *v.* BALDEO (OPPOSITE PARTY).*

Act No. IX of 1887 (*Provincial Small Cause Courts Act*), *section* 17—*Act No. IX of* 1908 (*Indian Limitation Act*), *schedule* 1, *article* 164—*Application for re-hearing—Necessity for furnishing security within time.*

The giving of security within the time limited by article 164 of the first schedule to the Indian Limitation Act, 1908, is a necessary condition precedent to the entertainment of an

*Civil Revision No. 111 of 1927.

application under section 17 of the Provincial Small Cause Courts Act, 1887, for the re-hearing of a suit which has been decreed *ex parte*. *Badlu Singh* v. *Panthu Singh* (1) and *Assan Mohammad Sahib* v. *Rahim Sahib* (2), referred to.

THIS was an application for revision of an order passed by the Additional Munsif of Farrukhabad in a Small Cause Court suit allowing a judgement-debtor's application for the re-hearing of the suit, which had been decreed *ex parte*.

The facts of the case sufficiently appear from the judgement of the Court.

Munshi *Shambhu Nath Seth*, for the applicants.

Munshi *Baleshwari Prasad*, for the opposite party.

DALAL, J.—A decree was passed by a Court of Small Causes at Farrukhabad, on the 8th of December, 1926, and was transferred for execution to the court of the Munsif of Tilhar in the Shahjahanpur District. The judgement-debtor Baldeo was arrested in execution of the decree and in the Tilhar court he gave security of a third person for his appearance in the Tilhar court on the 30th of April, 1927. Subsequently, on the 9th of March, 1927, he applied to the Farrukhabad court for re-hearing, but at that time did not deposit in court the amount due from him under the decree, nor give security for the performance of the decree. His petition of re-hearing was granted on the 29th of March, 1927, the Farrukhabad court holding that sufficient security was given on the 4th of March, 1927, and there was no necessity for the filing of fresh security. In this opinion the lower court was mistaken, because the security given in the Tilhar court was not for the satisfaction of the decree but for the appearance of the defendant in that court on the 30th of April, 1927. The plaintiff, if he

(1) (1922) 21 A.L.J., 173. (2) (1920) I.L.R., 43 Mad.. 579.

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obtained a decree, would not be able to recover it from the surety who gave security at Tilhar.

The provisions of section 17 of the Provincial Small Cause Courts Act, No. IX of 1887, are mandatory and the court does not acquire jurisdiction until cash is deposited or security is given. This has been held by this Court in *Badlu Singh* v. *Panthu Singh* (1). A Full Bench of the Madras High Court held in 1920 that these provisions were mandatory and the deposit may be made and security given within the period prescribed by the law of limitation for applications for re-hearing, i.e., article 164 of the Limitation Act of 1908 : *Assan Mohamed Sahib* v. *Rahim Sahib* (2). In the present case, even accepting that the defendant became aware of the decree against him on the 4th of March, 1927, the date of the security given in the Tilhar court, the security in the Farrukhabad court was not given till the 12th of April, 1927, i.e., more than 30 days after the time allowed under the Limitation Act for an application for re-hearing.

On behalf of the respondent Mr. *Baleshwari Prasad* pointed out that the applicant plaintiff had taken Rs. 5, which the lower court had fixed by way of damages for re-hearing, and argued that the appellant had submitted to the order and could not appeal. The question here, however, is of jurisdiction and no action of any party can confer jurisdiction on the court where it does not exist.

I hold that the lower court acted without jurisdiction, set aside its order of 29th of March, 1927, and restore the decree of the 8th of December, 1926.

No costs are allowed here.

Application allowed.

(1) (1922) 21 A.L.J., 173. (2) (1920) I.L.R., 43 Mad., 579.

APPELLATE CIVIL.

Before Mr. Justice Sulaiman and Mr. Justice Banerji.

AZIZ AHMAD (DEFENDANT) *v.* NAZIR AHMAD (PLAINTIFF) AND NAJIB-ULLAH KHAN AND OTHERS (DEFENDANTS).* 1927 *June*, 20.

Muhammadan law—Pre-emption—Shafi khalit—*Ownership of tree with overhanging branches—Plot divided by* kachcha *road over which the public had a mere right of way without ownership of the soil.*

In a suit for pre-emption under the Muhammadan law the property sold consisted of undivided shares in a plot of land adjoining the plaintiff's house. This plot was divided by a *kachcha* road over which the public had a right of passage, but the land of the road was not public property.

Held that the plaintiff was entitled to pre-empt the whole plot, and not merely the portion on his side of the *kachcha* road.

Held also that the fact that the branches of a tree project over the land of a neighbour does not give the owner of the tree any right as a *shafi khalit.*

Hari Krishna Joshi v. *Shankar Vithal* (1), and *Abdul Shakur* v. *Abdul Ghafur* (2), referred to.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Maulvi *Mukhtar Ahmad*, for the appellant.

Pandit *Uma Shankar Bajpai*, for the respondent.

SULAIMAN and BANERJI, JJ. :—This is a defendant's appeal arising out of a suit for pre-emption on the basis of Muhammadan law. The plaintiff's claim is based on an alleged right as a *shafi khalit*. The property sold

*Second Appeal No. 1157 of 1926, from a decree of L. Johnston, District Judge of Pilibhit, dated the 6th of January, 1926, confirming a decree of Lal Bhagwati Dayal Singh, Munsif of Pilibhit, dated the 6th of October, 1925.

(1) (1894) I.L.R., 19 Bom., 420. (2) (1910) 7 A.L.J., 641.

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consists of undivided shares in a plot of land adjacent to the house of Nazir Ahmad, plaintiff. There is also a tamarind tree standing in the compound of Nazir Ahmad which overhangs its branches on the spot in question. This plot is divided into two portions by what is called a *kachcha* public road, but the plot appears to be one plot and there has been no partition of the shares of the co-sharers.

The learned Judge has held that Nazir Ahmad has no right to claim to be a *shafi khalit*, because his tree spreads branches over the neighbouring land. He has relied on the case of *Hari Krishna Joshi* v. *Shankar Vithal* (1) as authority for the proposition that the overhanging branches confer no right of easement to the owner of the tree. It also appears to us that this circumstance does not give the plaintiff rights as a *shafi khalit*. In the foot-note to chapter II, page 481 of Baillie's Muhammadan Law, volume I, it is noted that

> "though rights of water and way are given as examples, it does not appear that a *khalit* in any other right than this has the right of pre-emption."

We must, therefore, reject this claim.

As regards the further claim that Nazir Ahmad's drain flows through this plot, the learned Judge has found that this drain in reality did not exist, but was a temporary arrangement invented for the purposes of this litigation. This claim must also be rejected.

The defendants, however, contend that inasmuch as the *kachcha* public road passes through the plot, the portion which lies away from the house should not be allowed to be pre-empted. It does not, however, appear that the land covered by this road belongs to the public. The land is in reality a part of this plot, though the public have a right to pass through it. Under these circumstances, the finding of the court below that the whole area

(1) (1894) I.L.R., 19 Bom., 420.

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is a compact one must be accepted and the plaintiff is entitled to pre-empt the whole of that plot: *Abdul Shakur* v. *Abdul Ghafur* (1).

We accordingly dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Mukerji and Mr. Justice Ashworth.

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June, 22.

PEARE MOHAN PRASAD (DECREE-HOLDER) *v.* RAGHUNATH LAL AND ANOTHER (JUDGEMENT-DEBTORS).*

Civil Procedure Code, order XXI, rule 2, sub-rule (3)—Act No. IX of 1908 (Indian Limitation Act), section 20—Execution of decree—Limitation—Certification of previous payments.

If a decree-holder's application for execution is barred by limitation, he cannot save the situation by pleading a previous payment of interest alleged to have been made before limitation had expired and asking the court to certify such payment then and there, i.e., when execution was already time-barred. *Baijnath* v. *Panna Lal* (2), *Gokul Chand* v. *Bhika* (3), *Chattar Singh* v. *Amir Singh* (4), *Eusuffzeman Sarkar* v. *Sanchia Lal Nahata* (5), *Pandurang* v. *Jagya* (6), *Masilamani Mudaliar* v. *Sethuswami Ayyar* (7), and *Sheikh Elahi Bux* v. *Nawab Lall* (8), referred to.

THE facts of this case were, briefly, as follows:—

The decree-holder obtained the decree in question on the 29th of October, 1919. The first application for execution was made on the 18th of March, 1922. The second application was made on the 12th of October, 1925, that is to say, more than three years after the date of the first application. On the face of it, the application would be time-barred. The decree-holder however, alleged in the application for execution that between the

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*Second Appeal No. 1321 of 1926, from a decree of Ali Ausat, District Judge of Ghazipur, dated the 8th of April, 1926, confirming a decree of S. Zillur Rahman, Munsif of Ballia, dated the 19th of December, 1925.

(1) (1910) 7 A.L.J., 641.
(2) (1924) I.L.R., 46 All., 635.
(3) (1914) 12 A.L.J., 387.
(4) (1916) I.L.R., 38 All., 204.
(5) (1915) I.L.R., 43 Calc., 207.
(6) (1920) I.L.R., 45 Bom., 91.
(7) (1917) I.L.R., 41 Mad., 251.
(8) (1919) 4 Pat. L.J., 159.

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14th of May, 1923, and the 22nd of September, 1925, he received several payments towards interest, and his case is that these payments save limitation. The court refused to execute the decree for want of a certificate of payment on behalf of the decree-holder. Thereupon, on the 14th of October, 1925, the decree-holder made an application certifying the payments. The judgement-debtor appeared (it appears without any notice) and contended that the application for execution was time-barred. Both the courts below held that the application was time-barred, and the decree-holder appealed.

Pandit *Ambika Prasad Pande*, for the appellant.

Munshi *Shiv Dihal Sinha*, for the respondents.

THE judgement of MUKERJI, J., after setting out the facts as above, thus continued :—

In this Court the learned counsel for the appellant, who has argued the case extremely well, has put forward before us two contentions in support of his appeal. His first contention is that the statement contained in the application for execution, that certain payments towards interest had been received prior to the execution application and on certain specified dates, would serve the purposes of certification, as contemplated by order XXI, rule 2 (3). His second contention is that, at any rate, his certificate of the 14th of October, 1925, that payments had been received, would be good enough for the purpose of removing the bar imposed by order XXI, rule 2 (3).

As regards the first point, the learned counsel has frankly admitted that the trend of rulings in this Court is against him. He has quoted the rulings that are against him and these rulings are all mentioned in the latest ruling on the point, viz., *Baijnath* v. *Panna Lal* (1). He has argued that the first case in this Court,

(1) (1924) I.L.R., 46 All., 635.

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viz., *Gokul Chand* v. *Bhika* (1), does not go entirely against him inasmuch as KNOX, J. mentioned it as an important matter that the factum of payment was not mentioned in the proper column in the execution application. In the cases of *Chattar Singh* v. *Amir Singh* (2) and *Baijnath* v. *Panna Lal* (3), the learned counsel pointed out, the expressions " certified " and " recorded " have been mixed up by the addition of the word " and " in the judgements, while there is the word " or " in the Code itself—order XXI, rule 2 (3). He has also pointed out that almost all other High Courts have held that a contemporaneous statement as to payment with the application for execution itself is good enough to satisfy the provision of sub-rule (3), rule 2, order XXI, Civil Procedure Code. He has quoted for his authority the cases of *Eusuffzeman Sarkar* v. *Sanchia Lal Nahata* (4), *Pandurang Balkrishna Golvankar* v. *Jagya Bhau Bhagat* (5), *Masilmani Mudaliar* v. *Sethuswami Ayyar* (6) and *Sheikh Elahi Bux* v. *Nawab Lall* (7).

Speaking for myself, I am of opinion that the contention of the learned counsel for the appellant ought to prevail. I would state my reasons very briefly, for I do not propose to decide the point according to the opinion held by me individually. The reason is this that my learned brother is against the view I am just going to propound, and the view I am taking is against the trend of authorities in this Court. In the circumstances, it would not be of much use for me to raise my voice in favour of a new interpretation, although that interpretation has found favour with other courts. The reasons for my opinion are these. There is a clear distinction between a decree-holder certifying payment and a judgement-debtor alleging payment. Order XXI,

(1) (1914) 12 A.L.J., 387.
(2) (1916) I.L.R., 38 All., 204.
(3) (1924) I.L.R., 46 All., 635.
(4) (1915) I.L.R., 43 Calc., 207.
(5) (1920) I.L.R., 45 Bom., 91.
(6) (1917) I.L.R., 41 Mad., 251.
(7 (1919) 4 Pat. L. J., 159.

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rule 2 does not, in itself, deal with any rule of limitation. It says that where a decree-holder has received payment, or a decree has been adjusted, *it is the duty* of the decree-holder to inform the court of the fact. Then it goes on to say that where a judgement-debtor has made a payment or there has been an adjustment of a decree, the judgement-debtor is *at liberty* to bring the matter to the notice of the court and ask the court to call upon the decree-holder to show cause why such alleged payment or adjustment should not be recorded as certified, that is to say, as certified by the decree-holder. In the first case a certificate by the decree-holder would be a statement against the decree-holder himself, and *primâ facie*, there would be some truth in the statement. In the second case a payment alleged by the judgement-debtor is always a statement in his favour, and it would be necessary before making a record of that statement to verify it. The rule, therefore, provided for a notice to the decree-holder and a decision, if necessary. We need not suppose that the Legislature was blind to the fact that the statement by the decree-holder that he had received payment might, in some cases, be to his own advantage and to the disadvantage of the judgement-debtor. The Legislature did not provide any rule of limitation for the decree-holder to certify, although it did provide for a short period of limitation where the judgement-debtor's application is concerned. It follows that the decree-holder is at liberty to certify the payment at any time he likes. In any case he is at liberty to certify the payment within three years of the payment, if article 181 of the first schedule of the Limitation Act applies. That being so, it would be open to the decree-holder to notify to the court, at any time before he makes his application for execution, that he has received a payment. Now, the question is whether he cannot notify the factum of the payment to the court

simultaneously with his application for execution. Sub-rule (3) of rule 2, order XXI, says: "A payment . . . which has not been certified . . . shall not be recognized by any court executing the decree". The meaning of this would be that when the court has to consider whether it should recognize an alleged payment, it will have to see whether that payment is certified or not. Where the payment has been alleged in the execution application itself. it would be doing no violence to the language of the law if it be said that the court, at the time of considering the question, would find that the decree-holder has already certified the payment. I need not point out that in every case of a certificate, how long so ever made before the execution application, if the judgement-debtor contests the allegation of payment, the decree-holder has always to prove it.

For the foregoing reasons I was inclined to accept the appellant's appeal and to allow the appellant an opportunity to prove whether he has actually received the alleged payments towards interest or not; but, as already stated, my voice would be too feeble to be effective and I do not propose to record a dissentient judgement for purely academic purposes.

The second contention of the learned counsel for the appellant is, in my opinion, untenable. The certificate, under the language of sub-rule (3), rule 2, order XXI, has always to precede the application for execution and cannot follow it.

In the result I would dismiss the appeal with costs.

ASHWORTH, J.—I concur in the dismissal of the appeal but for different reasons. Section 22 of the Limitation Act enacts that a fresh period of limitation shall be computed from the time when payment of interest on a debt is made. Order XXI, rule (3), Civil Procedure Code, enacts that an uncertified payment shall

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not be recognized by any court executing the decree. Reading these two provisions together, I hold that an execution court must compute limitation from the date not of payment but of certification. To do otherwise would be recognizing, to some extent, an uncertified payment. When, then, a decree-holder applies for execution he can only invoke a payment certified before execution became time-barred.

Ashworth J.

This is the view which has been taken by this High Court in several decisions, though it was not based on the precise reason that I have set forth. As that view accords with reasons commending themselves to me, I see no reason for departing from the position taken up hitherto by this High Court.

I would, however, point out that this view does not involve the extension of the period of limitation beyond the period prescribed from the date of actual payment. The view contracts the period of limitation by exclusion (at the beginning of such period) of the period between payment and certification but does not lengthen it at the other end.

I would hold, therefore, that both the applications now in question are time-barred.

BY THE COURT.—The appeal is dismissed with costs.

Appeal dismissed.

Before Sir Grimwood Mears, Knight, Chief Justice and Mr. Justice Lindsay.

JAISTH MADHO ACHARIYAJI AND OTHERS (DEFENDANTS) *v.* THAKUR SRI GAT ASHRAM NARAINJI (PLAINTIFF).* 1927 *June*, 24.

Act No. IX of 1908 (*Indian Limitation Act*), *section* 10; *schedule* 1, *article* 62—*Limitation—Suit on behalf of an idol to recover money alleged to have been misappropriated by the* mutawalli *or manager.*

Held that a suit brought in the name of an idol installed in a Hindu temple to recover money alleged to have been wrongfully diverted to his own use by the manager or *mutawalli*, instead of having been employed in the service of the idol, is not a suit against a trustee in whom property has become vested in trust for any specific purpose, within the meaning of section 10 of the Limitation Act, but is a suit for money payable by the defendant for money received by the defendant for the plaintiff's use.

Vidya Varuthi v. *Balusami Ayyar* (1), followed.

THE facts of this case sufficiently appear from the judgement of the Court.

Sir *Tej Bahadur Sapru* and Munshi *Narain Prasad Ashthana*, for the appellants.

Mr. *B. E. O'Conor*, for the respondent.

MEARS, C.J., and LINDSAY, J. :—The question to be decided in this appeal is one of limitation, namely, whether the suit was governed by article 62 of the first schedule to the Limitation Act, as contended by the appellant, or by section 10 of the Limitation Act as found by the court below.

Article 62 provides a period of three years' limitation for a suit to recover money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use. Section 10 of the Act contemplates a

*First Appeal No. 357 of 1924, from a decree of Shambhu Nath Dube, Subordinate Judge of Muttra, dated the 13th of September, 1924.

(1) (1921) I.L.R., 44 Mad., 831.

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suit brought against a person in whom property has become vested in trust for any specific purpose, or his legal representatives or assigns, for the purpose of following such property or the proceeds thereof or for an account of such property or proceeds; and it is declared that a suit for any of these purposes shall not be barred by any length of time.

In order to decide this question it is necessary to consider the nature of the suit and the legal position of the contesting defendant Jaishth Madho Achariyaji who is the appellant before us.

The plaintiff in the suit was the deity styled "Thakur Sri Gat Ashram Narainji Maharaj" installed in the temple at Muttra known as the Gaya Ashram Tila and the suit was brought on his behalf by a lady named Sundar Kunwar professing to act as the superintendent and guardian of the idol.

This lady and the eight defendants who were impleaded were described in the plaint as *mutawallis*.

As originally framed, the suit was one for rendition of accounts of the income and expenditure of the temple property, but by subsequent amendment it became a suit for the recovery of a specified sum of money due to the temple for a period beginning with the 15th of November, 1906, from the first defendant Jaishth Madho Achari.

The case for the plaintiff was that the temple was entitled to a one-half share of the income of a village named Khasraj Bhajanpura. The contesting defendant pleaded that the share of the temple was one-fourth, not one-half, and that he was entitled to appropriate a one-fourth share to his own use.

This defence prevailed and the suit was dismissed but, on appeal to this Court, the decree was reversed. It

was held that the temple had a right to a half share of the income from the village just mentioned.

This Court sent the suit back for disposal and it was then, for the first time, that the contesting defendant raised the plea of limitation with which we have now to deal. The plea was that by reason of article 62 of the first schedule to the Limitation Act the defendant could not be made liable for any sum accruing due prior to three years before the date of the suit.

The Subordinate Judge repelled this plea, being of opinion that the defendant was a trustee in whom (along with the other *mutawallis*) property had become vested for a specific purpose. He held that the suit could not be barred by any length of time.

The history of the temple is set out shortly in the judgement of the court below. It appears to have been built by one Pran Nath Sastri who died in the year 1830. How the property which constitutes the endowment was acquired is not clear; but the temple has been supported out of the revenues of some villages in the Gwalior State, and has for many years been in receipt of an annual payment from the proprietors of the Awagarh estate in these provinces. For some time indeed the temple properties were managed by one of the Rajas of Awa.

In the paper-book of First Appeal No. 401 of 1921, which was prepared when the present suit was previously under appeal to this Court, is to be found a report made by the Special Manager of the Awagarh Estate which discloses the origin of the annual contribution made by the estate to the temple. One of the Rajas, Pirthi Singh, allotted the revenue of two of the estate villages, Khasrai and Bhajanpur, for the maintenance of the temple. By some arrangement made subsequently, a sum fixed at Rs. 1,650 per annum was treated as the equivalent of the revenue and came to be paid regularly in certain shares to the temple and the priests. No document

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creating a trust was ever prepared but in the year 1850, under an award and an agreement, the temple was declared to be entitled to receive one-half of this annual sum, the other half being distributed among the Acharis, i.e., the descendants of Pran Nath Sastri.

A copy of this deed of agreement is in the paper-book of First Appeal No. 401 of 1921 (page 23) as also a copy of a subsequent agreement executed by the Acharis—dated the 2nd of November, 1874 (page 25) by which they bound themselves to pay into the temple treasury, in certain defined shares, a sum representing one-half of the total income received from the endowed property.

The report of the Special Manager shows that since the year 1867 the Awagarh estate made the annual contribution of Rs. 1,650, handing it over to the Acharis in accordance with the terms of the award just mentioned, until payment was withheld owing to disputes among the Acharis. After some interval the payments were resumed and the money has since been regularly made over to the Acharis who are the descendants of Pran Nath Sastri.

It is with this contribution from the Awa estate that we are concerned in the present suit, and the position seems to be that the proprietor of the Awa estate for the time being is the trustee, the temple, i.e., the idol installed in it, being the *cestui que trust* or beneficial owner of half the annual contribution made from the revenue of the village or villages called Khasrai Bhajanpur. There is no evidence to show that there has ever been any conveyance of these villages, or the income of them, to any trustee in trust for the specific purpose of the maintenance of the temple. The villages remain the property of the estate—subject to the obligation imposed by the owner upon himself—to pay yearly from the income of the villages a sum of Rs. 1,650 which is to be divided

half and half between the temple and the custodians or *mutawallis* of the temple.

While it may be that the *mutawallis* have at various times been described as "trustees" of the temple property, they are certainly not persons in whom, to use the language of section 10 of the Limitation Act, "property has become vested in trust for any specific purpose."

The position of *mutawallis* and *shebaits* has been defined in a recent judgement of their Lordships of the Privy Council, *Vidya Varuthi* v. *Balusami Ayyar* (1), at page 843, where it is said:—

"Neither under the Hindu law nor in the Muhammadan system is any property conveyed to a *shebait* or a *mutawalli* in the case of a dedication. Nor is any property vested in him; whatever property he holds for the idol or the institution he holds as manager, with certain beneficial interests regulated by custom or usage. Under the Muhammadan law the moment a *waqf* is created all rights of property pass out of the *waqif* and vest in God Almighty."

It follows from this that the position of the contesting defendant in this suit—now the appellant—is not that of the express trustee referred to in section 10 of the Limitation Act. As a *mutawalli* or custodian of the endowed property of the temple he may, in a general way, be described as a "trustee"—a person in a position of trust with respect to the administration of the temple properties—but no property is vested in him upon trust for any specific purpose. Whatever sums, therefore, he has received for and on behalf of the idol installed in the temple can be treated only as sums received to the use of the plaintiff idol and a suit to recover money so received is governed by article 62 of the Schedule to the Limitation Act. This point is therefore decided in favour of the appellant.

The only other ground of appeal which was argued was that concerning the rate of interest, 12 per cent

(1) (1921) I.L.R., 44 Mad., 831.

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per annum, allowed by the court below up to the date of the decree. It is said this is an excessive rate. We do not think so, and we should not be justified in interfering with the discretion of the court below to award interest at what it considered a reasonable rate. The patent dishonesty of the appellant in appropriating money which he knew did not belong to him is a very good ground for the award against him of interest at a substantial rate.

The appeal succeeds to the extent that we substitute for the decree of the court below a decree for profits received for the three years prior to suit at the rate of Rs. 412-8-0 per annum, carrying interest at 12 per cent per annum up to the date of this Court's decree and thereafter at 6 per cent per annum. The plaintiff will get proportionate costs upon this amount in the court below. The appellant, in view of his conduct as described above, will pay his own costs in this Court.

Decree modified.

Before Mr. Justice Iqbal Ahmad and Mr. Justice Kendall.

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May, 26.

ISHRI PRASAD (PLAINTIFF) *v.* SRI RAM (DEFENDANT).*

Civil Procedure Code, sections 13 *and* 14—*Suit on a foreign judgement*—"*Judgement given on the merits of the case*"—*Assertion by defendant that he was not residing within the jurisdiction when the suit was filed—Burden of proof.*

In a suit brought in the Rampur State the judgement, after giving a summary of the plaint, ran as follows:—"The defendant, notwithstanding due service of summons, has not contested the suit. The document is registered. The failure of the defendant to contest the suit amounts to an admission of the plaintiff's claim. Accordingly the plaintiff's suit is decreed."

*Second Appeal No. 376 of 1925, from a decree of Joti Sarup, Second Subordinate Judge of Saharanpur, dated the 15th of September 1924, confirming a decree of Niaz Ahmad, Additional Munsif of Saharanpur, dated the 16th of February, 1924.

Held, on suit brought by the plaintiff on this judgement in a British Indian Court, (1) that the judgement of the Rampur court was a judgement " on the merits of the case " within the meaning of section 13 (*b*) of the Code of Civil Procedure; (2) that, a certified copy of the judgement having been produced by the plaintiff, the British Indian Court was bound to presume that the judgement was pronounced by a court of competent jurisdiction; and, if the defendant wished to get rid of that presumption, on the allegation that he was not residing in Rampur on the date when the suit was filed, it was for him to prove that he was not, and not for the plaintiff to prove that he was.

Keymer v. *Visvanatham Reddi* (1), *Cole* v. *Harper* (2) and *Kassim Mamoojee* v. *Isuf Mahomed Sulliman* (3), referred to.

THE appellant sued the respondent in the court of the Munsif of Saharanpur for recovery of Rs. 979-9-6 as due to him from the respondent under a decree obtained by the appellant in the Rampur State.

The plaintiff's case was that the respondent was living in Rampur State at the time that the suit was filed and the decree was obtained by the plaintiff, but subsequent to the passing of the decree, the defendant had left Rampur State and settled within the local limits of the jurisdiction of the court of the Munsif of Saharanpur.

The suit was contested by the defendant *inter alia* on the ground that he was not residing in Rampur State at the time of the institution of the suit in the court of Rampur State and, as such, the foreign judgement obtained by the plaintiff could not be enforced against him, in view of the provisions of section 13 (*a*) of the Code of Civil Procedure.

The Munsif, while holding that the defendant and one Kesari were jointly and severally liable for the debt with respect to which the plaintiff had obtained a decree

(1) (1916) I.L.R., 40 Mad., 112. (2) (1919) I.L.R., 41 All., 521.
(3) (1902) I.L.R., 29 Calc., 509.

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in Rampur State, dismissed the plaintiff's suit on the ground that " the defendant's presence or even residence in Rampur when the case was in progress there has not at all been proved " and " therefore the court in Rampur had no jurisdiction over the defendant and the judgement thus passed carries no weight."

On appeal by the plaintiff the lower appellate court after observing that the only question argued before it was "the question of jurisdiction" and after referring to section 13 (*a*) of the Code of Civil Procedure, held that there was " not a scrap of evidence on the record to show that the defendant lived in Rampur when the decree was passed against him." After recording this finding the lower appellate court referred to the case of *Keymer* v. *Visvanatham Reddi* (1) and recorded a finding in the following terms:—" I hold that such a judgement was not a judgement given on the merits of the case as contemplated by section 13 of the Civil Procedure Code and thus no action could be maintained on it in the Indian courts." The plaintiff appealed.

Munshi *Shambhu Nath Seṭh*, for the appellant.

Mr. *Muhammad Husain*, for the respondent.

THE judgement of the Court (IQBAL AHMAD and KENDALL, JJ.), after setting out the facts as above, thus continued:—

It is argued by the learned counsel for the appellant that the judgement, on which the suit giving rise to the present appeal was based, was a judgement given " on the merits of the case " and the lower appellate court has erred in holding otherwise. It is further argued that the courts below were wrong in proceeding on the assumption that it lay on the plaintiff appellant to show that the defendant was residing within the jurisdiction

(1) (1916) I.L.R., 40 Mad., 112.

of Rampur court at the time when the suit was filed and the decree was obtained by the plaintiff and that, in view of the provisions of section 14 of the Code of Civil Procedure, it was incumbent on the courts below to presume that the judgement, on which the present suit was based, was pronounced by a court of competent jurisdiction, unless the contrary was proved.

It is a fact that the decree obtained by the plaintiff in Rampur was an *ex parte* decree. The judgement of the Rampur court, after giving a summary of the plaint, runs as follows :—

> " The defendant notwithstanding due service of summons has not contested the suit. The document is registered. The failure of the defendant to contest the suit amounts to an admission of the plaintiff's claim. Accordingly the plaintiff's suit is decreed."

We are unable to hold that this judgement was not a judgement given " on the merits of the case." It appears to us that the phrase " the merits of the case " has been used in the Code in contradistinction to a judgement by way of penalty. If without considering the questions, the determination of which is necessary for the decision of the case, the court, because of certain default made by a plaintiff or by a defendant, penalizes the party in default by deciding the case against him, the decision cannot be regarded as a " judgement given on the merits of the case." In the present case it appears that the Rampur court was impressed by the fact that the document sued on was a registered document, and having taken that fact into consideration along with the fact that the defendant did not contest the plaintiff's claim, came to the conclusion that the plaintiff's case was true. That being so, it cannot be said that that court pronounced its judgement without considering the question whether or not the amount claimed was due to

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the plaintiff from the defendant. The case reported as *Keymer* v. *Visvanatham Reddi* (1), on which reliance has been placed by the lower appellate court, is distinguishable. In that case, upon the defence being put in, the plaintiff applied for liberty to exhibit interrogatories. He was allowed to do so, and the interrogatories were exhibited, calling upon the defendant to answer with respect to some of the material matters in dispute. This the defendant failed to do, and then an application to have the defence struck out was made on behalf of the plaintiff under order XXXI, rule 21 of the English Judicature Act, which provides that where a defendant fails to comply with an order to answer interrogatories he shall be liable to have his defence struck out. The application was allowed, and the plaintiff was allowed to sign judgement against the defendant. The judgement so obtained by the plaintiff was not a judgement on the merits, inasmuch as, as observed by their Lordships of the Privy Council, not one of the questions that arose for consideration in the case was "ever considered" or was "ever the subject of the adjudication at all" and the merits of the case were never investigated. As was pointed out in the case of *Cole* v. *Harper* (2), "the judgement followed as a penalty upon the defendant not complying with the order of the court." In the present case a decree was granted to the plaintiff by the Rampur court, not because of the failure of the defendant to comply with any order of the court but because the court, rightly or wrongly, was of opinion that the fact that the document on which the suit was based was registered coupled with the omission of the defendant to contest the suit furnished a *primâ facie* proof of the genuineness of the plaintiff's claim. We are, therefore, unable to hold that the judgement on which the present suit was based was a judgement that was

(1) (1916) I.L.R., 40 Mad., 112. (2) (1919) I.L.R., 41 All., 521.

pronounced by the Rampur court without considering the merits of the case.

The argument of the learned counsel for the appellant, that both the courts below wrongly cast on the plaintiff the burden of proving the fact that the defendant was subject to the jurisdiction of the Rampur court when the suit was filed in Rampur, has considerable force. The courts below seem to have overlooked section 14 of the Code of Civil Procedure. The plaintiff did produce a certified copy of the judgement of the Rampur court. On such copy being produced, it was imperative on the courts below to presume that the judgement was pronounced by a court of competent jurisdiction, unless the contrary was proved. It is a well settled rule of international law, that courts cannot, by their judgements, bind absent foreigners who have not submitted to their jurisdiction, and can only exercise jurisdiction over persons who are within the territorial limits of their jurisdiction, and, therefore, a judgement of a foreign court obtained against a defendant cannot be enforced in British India where the defendant at the time of the commencement of the suit was not a subject of, nor resident in, the country in which the judgement was obtained; *vide* the case of *Kassim Mamoojee* v. *Isuf Mahomed Sullaiman* (1). That being so, in a suit based on a foreign judgement, one of the questions that arises for consideration is, was the defendant at the time of the commencement of the suit in the foreign court residing within the territorial limits of the jurisdiction of the State in which the suit was brought? But on the production of a certified copy of a foreign judgement the court is bound to presume that the judgement " was pronounced by a court of competent jurisdiction " and therefore it devolves on the defendant, by his pleading and evidence, to deny and disprove every fact and circumstance which negatives

(1) (1902) I.L.R., 29 Calc., 509.

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the jurisdiction of the foreign court. "Jurisdiction over him being presumed, he must allege and establish facts from which the inference must necessarily arise that in his case the presumption is contrary to the facts;" *vide* Freeman on Judgements, 4th edition, page 1017. In the present case, as already stated, both the courts below decided the point against the plaintiff because the plaintiff adduced no evidence to show that the defendant was residing in Rampur State at the time that the suit was filed against him by the plaintiff. Inasmuch as the findings of the courts below on this point proceed on a misapprehension of the law on the subject, we consider it desirable to decide this appeal after having a finding from the lower appellate court on the following points :—

(1) Is the defendant a subject of Rampur State?

(2) Was the defendant residing in Rampur State at the time that the suit was filed by the plaintiff in that State?

Parties will be allowed to adduce further evidence. On receipt of the finding ten days will be allowed for filing objections.

Issues remitted.

Before Sir Grimwood Mears, Knight, Chief Justice and Mr. Justice Sen.

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EQUITABLE TRUST COMPANY AND OTHERS (PLAINTIFFS) v. HAFIZ MUHAMMAD HALIM AND COMPANY AND OTHERS (DEFENDANTS.)*

Civil Procedure Code, section 115—*Revision—Non-joinder of necessary party—Order refusing substitution and consequential amendments—"Case decided".*

Held that no revision would lie against an order of a Subordinate Judge refusing to substitute as plaintiffs in an original suit certain persons alleged to be interested in the

*Civil Revision No. 112 of 1927.

suit, but whose remedy as plaintiffs was already time-barred; the order was a mere interlocutory order, and did not amount to the decision of a "case" within the meaning of section 115 of the Code of Civil Procedure.

Buddhu Lal v. *Mewa Ram* (1), *Lal Chand* v. *Behari Lal* (2) and *Balkrishna* v. *Vasudeva Aiyar* (3), *Kalidas Kevaldas* v. *Nathu Bhagavan* (4), *Seshan Patter* v. *Veera Raghavan Patter* (5), and *Fatmabai* v. *Pirbhai Virji* (6), referred to. *Umed Mal* v. *Chand Mal* (7), distinguished.

THE facts of this case were as follows :—

The Deccan Trading Co., incorporated in New York, entered into a partnership with the defendant firm for the purchase and sale of hides and skins, and the agreement was that the parties were to share the profits and bear the loss in equal moieties. Originally the terms of this partnership were not reduced to writing. Skins and hides used to be purchased by the defendants in India and shipped to America, and the plaintiffs used to sell the same, and, after sale, the profits and losses used to be received or borne by the parties in equal shares. Some time in 1920 the defendants approached the plaintiffs for certain monetary accommodations on the security of the goods shipped. The plaintiffs in their turn applied for loans to these banks, The National Bank of South Africa, New York, The Philadelphia National Bank of Philadelphia, and the Equitable Trust Co. of New York. These banks agreed to lend money, but they desired that a written contract of partnership be prepared between the plaintiffs and the defendants clearly defining the terms of their respective rights and liabilities. In consequence of this, a deed of partnership was executed on the 14th of September, 1920. A second agreement was entered into between the same parties on the 18th of February, 1921, whereby the terms of the earlier document

(1) (1921) I.L.R., 43 All., 564.
(2) (1924) I.L.R., 5 Lah., 288.
(3) (1917) 44 I.A., 261.
(4) (1883) I.L.R., 7 Bom., 217.
(5) (1909) I.L.R., 32 Mad., 284.
(6) (1897) I.L.R., 21 Bom., 580.
(7) (1926) 25 A.L.J., 61.

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were confirmed. Unfortunately for the parties, from February, 1920, onwards the market for hides in America seriously declined, which resulted in very heavy losses. Thereupon the Deccan Trading Co. instituted a suit in the court of the Subordinate Judge of Cawnpore, on the 16th of January, 1923, for recovery of Rs. 6,68,215 and annas 14. The suit was contested on the ground that no money was due to the plaintiffs, that the plaintiff Company had gone into voluntary liquidation in 1920, and a syndicate of creditors was formed in February, 1921, to "oversee the liquidation", and that the suit was misconceived as the plaintiffs ought to have sued for dissolution of partnership and accounts.

A few days before the institution of the present suit the plaintiffs, on the 8th of December, 1922, executed an agreement in favour of three banks, namely, The National Bank of South Africa, the Equitable Trust Co. of New York and The Philadelphia National Bank of Philadelphia. This document assigned the *choses in action* owned by the plaintiff company against the defendants to the three banks aforesaid.

Issues were framed on the 9th of April, 1923, and a large quantity of oral evidence was put in. Some of the witnesses were examined in America on commission, whose evidence began on the 29th of March, 1926. It was in the course of this evidence that it was brought out that the document, dated the 8th of December, 1922, was followed by another document between the plaintiff and his numerous creditors, including the three sets of appellants in the present appeal. This document was a confirmation of the earlier deed of assignment, dated the 8th of December, 1922. It secured to the assignees and their successors and assigns full power and authority to ask, demand, collect, receive, compound and give acquittance for all sums of money now due or hereafter to

become due by reason of the said Halim claim. But the document did not by itself create or transfer any interest in the *choses in action*.

It may be noticed that the dates of the accrual of cause of action for the plaintiffs' suit were put severally in the year 1920, or the 2nd of January, 1921, 14th of September, 1920, and the 18th of February, 1921.

On the 8th of November, 1926, an application was made to the learned Subordinate Judge of Cawnpore by the Equitable Trust Co. of New York, Gerard National Bank and the Barclays Bank (Dominion, Colonial and Overseas). It purported to be under order I, rule 10 and order VI, rule 17 of the Code of Civil Procedure. The prayers contained in the petition were : (1) that the applicants be impleaded as plaintiffs in the suit either in addition to or in substitution of the original plaintiffs, namely, the Deccan Trading Co., (2) that consequential amendments be made in a number of paragraphs and (3) that in the relief claimed a further relief for dissolution of partnership and accounts be added. It was said in this application that the Deccan Trading Co. incorporated in New York sued in January, 1923, without joining as plaintiffs the Equitable Trust Co., New York, the National Bank of South Africa, Limited, and the Philadelphia National Bank of Philadelphia, in whose favour a deed of assignment had been executed by the Deccan Trading Co. of New York in 1922, because the said deed of assignment was neither acted upon nor was it in strict conformity with the laws of America, and it was doubtful whether the Banks could be made parties on that deed, and to remedy this defect a complete "distribution agreement" was executed on the 25th of June, 1925, whereby the deed of assignment was put on sounder basis and illegal anomalies removed. Under this latter deed the Gerard National Bank became successors to the Philadelphia

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National Bank, and Barclays Bank (Dominion, Colonial and Overseas) became successors to the National Bank of South Africa, and these two bodies jointly with the Equitable Trust Co., prayed to be impleaded as plaintiffs.

The defendants contested the application on the ground that the deed, dated the 8th of December, 1922, was a complete assignment by the plaintiffs of their right to sue in favour of the Equitable Trust Co. and the two other Banks, that the deed, dated the 25th of June, 1925, was only in confirmation of what was done by the deed of prior date and did not amount to a devolution or transfer of the plaintiffs' interest in favour of the appellants during the pendency of the suit, and that the applicants should not be made parties after the period of limitation on the original cause of action had expired.

While arguments were in progress in the court below, a further application was made to the Subordinate Judge under order XXII, rule 10, of the Code of Civil Procedure on the 22nd of December, 1926. The Subordinate Judge disallowed the application. He accepted the defendants' contentions in their entirety. He held that the document dated the 8th of December, 1922, was a deed of absolute assignment, that no new rights and liabilities were created by the deed dated the 25th of June, 1925, that it was not proved by the law of the United States that the document of the 8th of December, 1922, created only a charge, or at the most a security, that the deed dated the 25th of June, 1925, recognized the legal effect of the earlier deed as a deed of absolute transfer and that the suit had not been instituted through a *bonâ fide* mistake on the part of the plaintiff within the purview of order XXII, rule 10, of the Code of Civil Procedure. He also held that no amendment of pleadings was necessary for the purpose of determining the real questions of controversy between the parties. He accordingly dismissed the application.

Not being certain whether the order of the Subordinate Judge was open to appeal, or to revision, the applicants presented to the High Court both a first appeal from order and also an application for revision.

The appeal was dismissed upon the grounds that the original application was not one which admitted of an appeal from the order passed thereon, whilst the second application could not be said to come within the terms of order XXII, rule 10 of the Code of Civil Procedure.

The Bench then proceeded to deal with the application for revision.

Sir *Tej Bahadur Sapru*, Munshi *Ambika Prasad* and Munshi *B. B. Chandra*, for the applicants.

Mr. *B. E. O'Conor*, Dr. *Kailas Nath Katju* and Munshi *Shambhu Nath Seth*, for the opposite party.

THE judgement of the Court (MEARS, C.J., and SEN, J.) after referring to the facts as set out in their judgement in the appeal, thus proceeded :—

A preliminary objection has been taken by the opposite party that the application for revision is not competent. It has been argued that the order in question is an interlocutory order, and that no "case" has been "decided" within the meaning of section 115 of the Code of Civil Procedure, and, in consequence, no application for revision lies to this Court. In answer to this contention it has been argued that the applicants were necessary parties to the action, and the court has committed material irregularity in the exercise of its jurisdiction by disallowing the petition, and thereby excluding a party whose presence was necessary in the action, and without whose presence the action could not be satisfactorily decided.

Reliance has been placed on *Umed Mal* v. *Chand Mal* (1). In this case the mortgagee decree-holder claimed possession of a certain plot of land by right of purchase

(1) (1926) 25 A.L.J., 61.

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under his mortgage decree. The suit was directed against a third party, who happened to be in possession. He contended that the property belonged to the mortgagor and had not passed to the mortgagee under his auction-purchase and that the suit was bad by reason of non-joinder of the mortgagor. The first two courts decreed the plaintiff's claim, but the Chief Commissioner of Ajmer and Merwara on revision dismissed the suit on two grounds, firstly, on a proper construction of certain material documents which did not prove that the land belonged to the plaintiff, and, secondly, the court below had acted with material irregularity in the exercise of jurisdiction in trying the suit behind the back of the mortgagor. Their Lordships of the Privy Council affirmed the decision of the Chief Commissioner, but in doing so they did not lay down any broad proposition of law for the guidance of Indian courts. They affirmed the judgement of the Chief Commissioner in view of the circumstances of the case. The case was not remanded by the Privy Council for further trial after impleading the mortgagor in exercise of any powers under order I, rule 10 (clause 2) of the Code of Civil Procedure, and as a matter of fact no application was made in this case for amendment of the claim by addition of parties, or substitution of other persons in place of the plaintiff even after the period of limitation on the original cause of action expired. In view of these facts the case does not appear to be of any great assistance to us. It is not desirable to add or substitute as parties to an action persons whose right to sue has already become time-barred. See *Kali Das Kevaldas* v. *Nathu Bhagavan* (1), *Seshan Patter* v. *Veera Raghavan Patter* (2), *Fatmabai* v. *Pirbhai Virji* (3).

The word "case" in section 115 is more comprehensive than the word "suit". But the word "case" has

(1) (1883) I.L.R., 7 Bom., 217. (2) (1909) I.L.R., 32 Mad., 284.
(3) (1897) I.L.R., 21 Bom., 580.

order has not been held by the majority of this Court to amount to a "case decided" within the meaning of section 115 of the Code of Civil Procedure. See *Buddhu Lal* v. *Mewa Ram* (1). The same view was taken by a Full Bench of the Lahore High Court in *Lal Chand* v. *Behari Lal* (2). It is settled law that a finding on an issue or part of an issue not going to the root of the case cannot be revised by the High Court under section 115 of the Code of Civil Procedure. In the case of *Balkrishna Udayar* v. *Vasudeva Aiyar* (3) their Lordships of the Privy Council are reported to have said :

"It will be observed that the section 115 applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved."

We hold that there was no wrong assumption or irregular exercise of jurisdiction by the court below in dealing with the application dated the 8th of November, 1926.

The result is that we sustain the preliminary objection and dismiss this application with costs.

Application dismissed.

(1) (1921) I.L.R., 43 All., 564. (2) (1924) I.L.R., 5 Lah., 288.
(3) (1917) 44 I.A., 261.

APPELLATE CIVIL.

Before Mr. Justice Mukerji and Mr. Justice Ashworth.

SIDH GOPAL (DEFENDANT) v. BIHARI LAL (PLAINTIFF).*

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June, 28.

Family arrangement—"Bonâ fide dispute"—Estoppel.

The only requisite necessary to make valid a family arrangement is that it should be a transaction between members of the same family, which is for the benefit of the family generally, as, for example, one which tends to the preservation of the family property, to the peace or security of the family and the avoiding of family disputes and litigation, or to the securing of the honour of the family.

The expression "*bonâ fide* dispute" means nothing more than that each party must intend to press his claim to the property by litigation or otherwise. It has nothing to do with whether the claim is good or bad in law.

THIS was a second appeal arising out of a suit brought by the plaintiff respondent, Bihari Lal, against the defendant appellant, Sidh Gopal, for recovery of a half share in certain zamindari property. The plaintiff was admittedly in possession of the other half share. There were three brothers, Bihari Lal the plaintiff, Nand Kishore, and Hargobind. Nand Kishore was the father of the defendant Sidh Gopal. He died 30 years ago. Hargobind died only four years ago, and it was the share of the zamindari property which he enjoyed during his life-time that was the subject-matter of the present suit. The plaintiff Bihari Lal's case was that Hargobind died separate from the others, and that he, as Hargobind's brother, had a preferential right to the property over his nephew Sidh Gopal. The defence of Sidh Gopal was that the deceased Hargobind and his father (and afterwards himself) were joint and that Bihari Lal was separate. This plea was rejected by both the lower

*Second Appeal No. 1336 of 1925, from a decree of Syed Iftikhar Husain, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge of Allahabad, dated the 3rd of April, 1925, reversing a decree of Muhammad Taqi Khan, Munsif of West Allahabad, dated the 8th of November, 1924.

courts. Sidh Gopal also pleaded a family arrangement between himself and Bihari Lal, arrived at at the time of Hargobind's death, whereby it was agreed that they should each take a moiety of Hargobind's property. The trial court found in favour of this alleged settlement. The lower appellate court found against it. That court found that on Hargobind's death Bihari Lal was claiming the whole of Hargobind's fractional share and Sidh Gopal was also claiming the whole of it. It found that Sidh Gopal had in law no title whatever, as the evidence clearly showed that he was separate from Hargobind. It found, however, that the parties were advised by their community to settle the matter, and agreed to take the property of Hargobind half and half. In pursuance of this agreement they put in an application to the revenue court that they should be entered jointly in the revenue papers. The lower appellate court was of the opinion that this would have been a family settlement if there had been a *bonâ fide* dispute and a *bonâ fide* settlement. It held, however, that there was no *bonâ fide* dispute, because *bonâ fide* dispute implied a *bonâ fide* claim by each party, and Sidh Gopal could have no belief in the validity of his claim. It, therefore, refused to acknowledge the settlement as a binding family settlement, and decreed the suit. The defendant appealed.

Mr. *A. P. Dube*, Munshi *Ambika Prasad* and Munshi *B. B. Chandra*, for the appellant.

Pandit *Rama Kant Malaviya*, for the respondent.

The judgement of ASHWORTH, J., after setting out the facts as above, thus continued :—

In appeal the appellant Sidh Gopal argues that the lower appellate court was wrong in considering it necessary that Sidh Gopal's claim should have been based on some valid ground. His counsel urges that it is sufficient to say that there was a dispute between the parties and that each party was determined to press his claim, whatever

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its merits. With this reasoning I am disposed to agree. The learned counsel for the respondent has taken the following grounds for upholding the decision of the lower appellate court. His first ground is that the fact of any agreement is merely based on an application to the revenue court, and that application merely asked for the names of both parties to be entered jointly inasmuch as both parties were legal representatives of the deceased. There is no authority for holding that an application to a revenue court cannot be good evidence of a preceding settlement. The Privy Council case of *Chokhey Singh* v. *Jote Singh* (1) was merely authority for holding that a particular application in a particular case was not sufficient proof of any preceding compromise. In the present case the lower appellate court has relied not only on the application to the revenue court for mutation, but also on the oral evidence and on the surrounding circumstances. I consider that there was material on which the lower appellate court could come to the finding that there had been a compromise before mutation, and that in second appeal it is not open to us to set aside this finding. A second point taken was that the evidence of a family arrangement did not disclose any sufficiently precise settlement to justify effect being given to it. It is pointed out that the application to the mutation court did not specify the shares of the parties, but only asked for an entry that they hold jointly. This application, however, to the revenue court had to be read in the light of the previous history of the property and in the light of surrounding circumstances. It could also be read in the light of the oral evidence produced in this court which was believed by the lower court. So read, there can be no question that, if there was a compromise at all, it was a compromise that the parties should hold the property of Hargobind in equal moeties. The next point taken up

(1) (1908) I.L.R., 31 All., 73.

is this. It is said that for a family settlement to be recognized as such there must be a *bonâ fide* dispute between the parties, and this is interpreted by counsel to mean that the dispute must arise out of a *bonâ fide* claim raised by each party. In this case he urges that the court below has come to a finding that Sidh Gopal could have had no real belief in the validity of his claim. Consequently his claim was not *bonâ fide* and could not give rise to a *bonâ fide* dispute or to a *bonâ fide* settlement. The expression "*bonâ fide* dispute" has been used in many decisions as a requisite for a family settlement. In my opinion it means nothing more than that each party must intend to press his claim to the property. The word "*bonâ fide*" indeed will have no meaning except when one of the parties to the dispute is a trustee or qualified owner. In such a case, the trustee or the qualified owner cannot defend a transfer of the property, made to defeat the interest of his beneficiary or a person for whom he stands, by merely alleging that another member of the family claimed the property and that there was a dispute. In such a case, there is really no dispute. The expression "*bonâ fide*" is not applicable to a case where each party is contending for an advantage to himself in his own right. Every decision relied upon by counsel for the contention that the dispute must be a *bonâ fide* dispute deals with a case where one of the parties was a Hindu female with qualified ownership. Nor again do I hold that the claim by each party to the settlement must be a claim which that party believes to be justified both upon facts and law. It is sufficient to point out that there might be an illegitimate son, who as such could have no title to the property and who was not likely to be able to produce evidence to prove his legitimacy. Supposing he claimed to be legitimate and threatened to litigate. If the rest of the family came to an arrangement with him, it could not be said that this failed to

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be a family arrangement. In other words I would construe a *bonâ fide* claim merely as a claim which the person making it intended to press by litigation or otherwise. The only requisite required to make valid a family arrangement is that it should be "a transaction between members of the same family which is for the benefit of the family generally, as, for example, one which tends to the preservation of the family property, to the peace or security of the family and the avoiding of family disputes and litigation, or to the saving of the honour of the family." (See the definition of "family arrangement" in Halsbury's Laws of England, volume 14, page 540). In this case it is clear that the community considered that the uncle and nephew should not fight over the matter. There can be no doubt that this arrangement was accepted by Bihari Lal for the purpose of avoiding litigation and he cannot be permitted to go back on the arrangement.

For the above reasons I hold that the lower court was wrong in finding that this settlement was not valid as a family settlement and prefer the reasoning of the trial court. I would allow this appeal and restore the decree of the trial court.

MUKERJI, J.—I agree with my learned brother that the decree of the lower court should be set aside and the decree of the court of first instance dismissing the respondent's suit should be restored.

The facts found are very simple. A person died leaving a brother and a nephew. If the deceased person was separate from his relations, the brother would succeed and not the nephew. If the nephew and the deceased were joint, the brother would be excluded. There was a claim for the deceased's property both by the brother and the nephew. The castemen decided that in order to avoid litigation the parties should divide the

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property equally amongst themselves. Accordingly an application was put before the revenue court stating that the names of the claimants should be put down as the heirs of the deceased person. This entry continued for four years. On foot of this entry the plaintiff, the brother of the deceased person, brought two suits for recovery of profits against the defendant. It is clear then that there was a dispute between two male persons about the heirship of the deceased person. That dispute was settled at the instance of castemen in a particular way. The settlement arrived at was given effect to at the instance of the claimants in the revenue papers, and the plaintiff in this case brought suits for profits in pursuance of that agreement. The question then is whether, after all this has happened, the settlement of dispute is to be set aside merely on the ground that there was no "*bonâ fide* claim" on the part of the defendant, and the settlement of the dispute was of no consequence. I am not prepared to say that any such contention should prevail.

Case after case has been quoted before us. It is enough to say that each case was decided on its own peculiar facts. Where parties are *sui juris* and understand their own interest, where each party is prepared to press his claim and where these parties, in order to avoid a litigation, come to an arrangement, I fail to see why that arrangement should not hold good. It is a contract which has been entered into for consideration and it should be binding on the parties. For these short reasons I would hold that the plaintiff's suit was rightly dismissed.

BY THE COURT.—The appeal is allowed with costs, the decree of the court below is set aside and the decree of the court of first instance restored with costs throughout.

Appeal allowed.

Before Mr. Justice Lindsay and Mr. Justice Sulaiman, and, on a reference, before Mr. Justice Mukerji.

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April, 26.
May, 23.
June, 29.

SHIAM LAL AND ANOTHER (PLAINTIFFS) v. SOHAN LAL AND OTHERS (DEFENDANTS).*

Act No. IV of 1882 (*Transfer of Property Act*), *section* 52—Lis pendens—*Mortgage of property in suit* pendente lite—*Effect of decree on rights of mortgagee.*

T and *D* sued *DD* for the recovery of certain property. The suit was decreed, and the defendant appealed. Pending this appeal, the plaintiffs mortgaged an 8 biswa share in village Urena, which was part of the property in dispute, to one *W*. Subsequently the parties compromised the case, and by the decree which was passed in accordance with the compromise each of the parties got half of the property mortgaged, and it was further provided that the defendant *DD* should be liable for the debt due to *W* and that neither *T* nor *D* nor their property should be liable therefor. *W* having sold his rights as mortgagee, the vendees then sued on the mortgage.

Held by SULAIMAN and MUKERJI, JJ., that the mortgage was enforceable only against the 4 biswa share of the village Urena which was still held by *T* and *D*.

Per LINDSAY, J., dissenting:—

A transferee *pendente lite* is bound by the decree just as much as if he were a party to the suit and he must be bound by the whole decree and is not at liberty to take advantage of one part of the decree and repudiate another part.

The mortgage, therefore, was enforceable only against the 4 biswa share which had fallen to *DD* under the compromise.

Sheo Narain v. *Chunni Lal* (1), *Gulzari Lal* v. *Madho Ram* (2), *Faiyaz Husain Khan* v. *Prag Narain* (3), *Radhamadhub Haldar* v. *Monohur Mukerji* (4), *Moti Lal* v. *Karrabuldin* (5), *Bellamy* v. *Sabine* (6), *Hukm Singh* v. *Zauki Lal* (7), and *Annamali Chettiar* v. *Malayandi Appaya* (8), referred to.

*First Appeal No. 286 of 1924, from a decree of Rup Kishan Agha, Subordinate Judge of Budaun, dated the 25th of April, 1924.

(1) (1900) I.L.R., 22 All., 243.
(2) (1904) I.L.R., 26 All., 447.
(3) (1907) I.L.R., 29 All., 339.
(4) (1888) I.L.R., 15 Calc., 756.
(5) (1897) I.L.R., 25 Calc., 179.
(6) (1857) 1 DeG. and J., 566.
(7) (1884) I.L.R., 6 All., 506.
(8) (1906) I.L.R., 29 Mad., 426.

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THE facts of this case were as follows:—

In 1908 Tori and Duli brought a suit for possession as reversioners against Damodar Das, who was in possession of the estate, alleging himself to be the adopted son of the deceased male owner. The suit was decreed by the court of first instance and Damodar Das appealed to the High Court. While the appeal was pending, Tori and Duli executed a mortgage of 8 biswas out of 18 biswas, 10 biswansis, in village Urena, which was part of the property in suit, in favour of one Wahid-ud-din, on the 3rd of August, 1911. Subsequently, on the 17th of March, 1913, Tori and Duli on the one hand, and Damodar Das on the other, compromised their claims. It was agreed between them that Tori and Duli would take half the share in the property and that Damodar Das would take the other half. It was also provided that Damodar Das should discharge the debt due to Wahid-ud-din and that neither Tori nor Duli nor their property should be liable therefor. Wahid-ud-din, the mortgagee, was no party to this compromise. A decree was framed in terms of the said compromise. After this decree was passed Wahid-ud-din sold his rights under the mortgage of the 3rd of August, 1911, to Shiam Lal and another for a sum of Rs. 1,471. The purchasers then brought the present suit for sale.

One common plea raised by all the defendants was that it was Damodar Das himself who took this sale-deed in 1913 *benami* in the name of the present plaintiffs, in order to defeat his creditors and transferees. It was pleaded that by this arrangement Damodar Das had really discharged the mortgage of 1911, which under the compromise decree he was bound to pay up.

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The representatives of Tori and Duli pleaded that, the mortgage being *pendente lite*, Wahid-ud-din and his representatives were bound by the compromise decree, and that, inasmuch as that decree provided that the share of Tori and Duli would not be liable for the mortgage-debt, the suit against them should be dismissed.

Damodar Das did not put in any written statement, but the position taken up by his representatives was that the plaintiffs not being a party to the decree, could not take advantage of it, nor could they ignore one part of the decree and try to enforce the other part. The trial court on the question of fact came to the conclusion that the purchase of 1913 was made by Damodar Das himself and the mortgage-debt had been discharged. On the question of law he was inclined to the view that "so far as the moiety of Tori and Duli is concerned, it is not absolved from liability, and so far as the other moiety is concerned, it is equally unaffected by the compromise".

The plaintiffs appealed from the decree and urged that the whole claim should be decreed against the entire share.

Dr. *Surendra Nath Sen*, Mr. *B. Malik* and Munshi *Harnandan Prasad*, for the appellants.

Pandit *Uma Shankar Bajpai*, Babu *Surendra Nath Gupta* and Munshi *Shabd Saran*, for the respondents.

The judgement of SULAIMAN, J., after setting out the facts as above, thus continued :—

As to the question of fact whether the purchase of 1913 was a *benami* transaction, we find ourselves unable to uphold the finding of the court below. [His Lordship discussed the question of fact.]

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The next question that requires consideration is whether both or either of the moiety shares is liable to be sold. Mr. *Bajpai* on behalf of Ram Sarup, a transferee from Sohan Lal, son of Duli and a representative of Tori and Duli, has strongly urged that the plaintiffs being representatives of Wahid-ud-din, who was a *pendente lite* transferee, are bound by the compromise decree and by all its terms. His contention is that a transfer *pendente lite* is subject to the terms of the decree that is eventually passed and further, that a transferee *pendente lite* is really a representative of one of the parties, and as such is bound by the decree. He, therefore, contends that as a result of the compromise decree, the half share which was occupied by Tori and Duli should be exempt from all liability, and as directed by the decree the entire debt should fall on the half share of Damodar Das in the hands of his representatives. Strong reliance has been placed by him on the case of *Sheo Narain* v. *Chunni Lal* (1) and the case of *Gulzari Lal* v. *Madho Ram* (2), and on the remarks contained in those judgements that a *pendente lite* transferee is bound by the decree and is a representative of a party.

It seems to me that those remarks should be understood in the light of the facts of those cases. The expressions "subject to the decree" or "bound by the decree" are certainly true in one sense. It would, however, not be fair to substitute these expressions in place of the words actually used in section 52 of the Transfer of Property Act in order to give it a meaning. What that section provides is that the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding, so as to affect the rights of any other party thereto under any decree or order which may be made therein. What we have, therefore, to see is not whether the enforcement of the mortgage would in any way affect the

(1) (1900) I.L.R., 22 All., 243. (2) (1904) I.L.R., 26 All., 447.

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rights of the mortgagors, Tori and Duli, but whether its enforcement would affect the rights of Damodar Das. As observed by their Lordships of the Privy Council in the case of *Faiyaz Husain Khan* v. *Prag Narain* (1), the correct mode of stating the doctrine of *lis pendens*, with which section 52 is concerned, is, as was observed by CRANWORTH, L. J., in an earlier case, that "*pendente lite* neither party to the litigation can alienate the property in dispute, so as to affect his opponent." The transferor himself cannot complain that his rights are affected by the transfer. A grantor cannot derogate from his own grant. Section 52 is, in my opinion, not intended for the protection of transferors in a pending litigation. So far as they themselves are concerned, they are bound by their own transfers. The other parties thereto require to be protected, otherwise, in the words of TURNER, L. J., quoted by their Lordships, "it would plainly be impossible that any action or suit could be brought to a successful termination if alienations *pendente lite* were permitted to prevail." Now Damodar Das was the party other than the transferors Tori and Duli. It has to be seen whether the rights of Damodar Das will be affected if the mortgage is enforced against the half share of Tori and Duli. It seems to me that even if Damodar Das and his representatives be temporarily relieved of their liability by the enforcement of the mortgage against the share of Tori and Duli, their rights are in no way injuriously affected thereby. I do not think that a temporary relief of his liability is tantamount to affecting the rights of Damodar Das. If any part of the mortgaged property is retained by the mortgagors under the decree, I see no good ground for holding that such property is absolved from its liability.

The argument that the *pendente lite* mortgagee is a representative of his mortgagors and is bound by the de-

(1) (1907) I.L.R., 29 All., 339.

cree cannot be pushed to an extreme limit. The cases relied upon by Mr. *Bajpai* were cases where the purchaser of the property in dispute was allowed to raise objections in the execution department as a representative of all the judgement-debtors. That is quite a different matter. In such cases the property has devolved on the transferee and he is certainly a representative of the judgement-debtor *qua* that property. It is also undoubtedly true that a *pendente lite* transferee is bound by the decree so far as it goes against his transferor, but it is quite a different thing to say that such a transferee should be treated for all purposes as if he were a party to the suit. Let us take an extreme case by way of illustration. A property is in dispute in a suit between *A* and *B*. While the suit is pending, *A* mortgages the property to *C*. Having transferred it, *A* enters into a compromise with *B* and on paying him some cash consideration, retains the entire property but throws the liability to pay the mortgage debt on *B*. The compromise specifically states that the property in the hands of *A* will be free from the liability of the mortgage and that *B* will be personally liable to pay the debt to *C*. Can, in such a case, *A* insist on *C* suing *B* on his personal liability? Can such a compromise put an end to the charge which had been created in favour of *C*? *A* transfer *pendente lite* is not absolutely void, but is only voidable at the instance of the other party to the suit whose rights are affected thereby. In my view, in such a case, the charge will remain alive. On the same principle I am of opinion that the mortgagees are entitled to enforce the charge against the half share retained by Tori and Duli which has now devolved on their representatives. It would be no consolation to the mortgagees to suggest that they may have a remedy against Damodar Das. That remedy, as will be shown hereafter, is not open to them, and in any case, even if it were open, the mortgaged property would be reduced to half,

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if the compromise decree means that a charge was to be created on the half share of Damodar Das.

As regards the moiety share of Damodar Das, I am, in the first place, very doubtful whether the plaintiffs, when their predecessor Wahid-ud-din was no party to the compromise decree, can enforce it against Damodar Das's representatives. No doubt, in equity, Damodar Das and his representatives are bound to pay the amount, but if a breach is committed by them, the representatives of Tori and Duli are entitled to damages. The plaintiffs cannot be deemed to be a party to the compromise so as to be in a position to take advantage of it against the will of Damodar Das and his representatives. In the second place, I feel another difficulty in giving the plaintiffs a decree against this half share also. No doubt the compromise itself provided that Damodar Das would be liable for the amount and it may, therefore, be stated that Damodar Das's rights under the decree would not be affected by the enforcement of the mortgage against him. It, however, seems to me that the plaintiffs are entitled to enforce their mortgage against the half share of Tori and Duli on the only ground that they are not bound by the decree so far as that interest is concerned. It is by ignoring the provisions of the decree that they can succeed against Tori and Duli. At one and the same time they cannot be allowed to take advantage of the very decree which they ignore in that way, and to enforce that decree against the representatives of Damodar Das. It would be approbating and reprobating the compromise simultaneously, which cannot be tolerated. I, therefore, think that the plaintiffs' only remedy is against the representatives of the transferors of their predecessor, and they cannot be allowed to proceed against Damodar Das's representatives.

I would, therefore, decree the claim for the entire amount due on the mortgage against the half share of

Tori and Duli which is now in the possession of Ram Sarup, defendant No. 3, and would dismiss the claim *in toto* against Damodar Das and his representatives.

LINDSAY, J.—The facts are all set out in the judgement of my learned brother and I agree with him in finding that the court below was wrong in holding that the assignment of the mortgage in suit was a *benami* transaction.

There remains the question of law, namely, the application of the doctrine of *lis pendens* to the facts of the case.

It is not disputed that the mortgage now in suit was executed *pendente lite* by Tori and Duli on the 3rd of August, 1911. The litigation in which Tori and Duli were arrayed against Damodar Das was terminated by a decree of this Court passed in terms of a compromise on the 17th of March, 1913. (See the decree in First Appeal No. 168 of 1911).

By the mortgage of the 3rd of August, 1911, an 8 biswa share of mauza Urena was hypothecated, and this share was one of the items directly and specifically in suit in the litigation concluded by the High Court decree above mentioned. That decree declared that a moiety of this 8 biswa share was awarded to the appellant Damodar Das and was to remain in his possession. It was also declared that Damodar Das was to discharge the debts incurred in favour of Shafi-ud-din (*sic.*) and Jammu of Sangrampur, and that neither the plaintiffs (Tori and Duli) nor their property were to be liable therefor. The name Shafi-ud-din in this decree is a mistake for Wahid-ud-din. The other half of this share and several other items of property were by the decree awarded to the respondents Tori and Duli subject to their discharging a debt owing to Mathura Prasad of Pilibhit. It was de-

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clared that neither Damodar Das nor his property were to be liable for this latter debt.

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It cannot, I think, be seriously argued that if Wahid-ud-din the mortgagee had been a party to this litigation he would have been bound by the decree and could only enforce his mortgage against the moiety of the 8 biswas awarded by the decree to Damodar Das. He was not, however, a party. On the other hand he was a transferee *pendente lite* and there is, I think, ample authority for the proposition that such a transferee is as much bound by the decree passed in the *lis* as if he had been an actual party to it.

My learned brother has quoted one of the observations made by Lord CRANWORTH in the well-known case of *Bellamy* v. *Sabine* (1). I should like to supplement this by a further quotation from the same judgement. It is as follows :—

"Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding not only on the litigant parties but also on those who derive title under them by alienations made pending the suit, whether such alienee had or had not notice of the pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end."

It is in the sense indicated in this passage that I interpret the judgements of their Lordships of the Privy Council in *Radhamadhub Haldar* v. *Monohar Mukerji* (2), and *Moti Lal* v. *Karrabuldin* (3).

In the Full Bench decision of this Court, *Gulzari Lal* v. *Madho Ram* (4), the former of these two judgements was cited by BANERJI, J., who at page 463 of the report expressed himself as follows :—

"In *Radhamadhub Haldar* v. *Monohar Mukerji* their Lordships of the Privy Council held that a person who had,

(1) (1857) 1 DeG. and J., 566.
(2) (1888) I.L.R., 15 Calc., 756.
(3) (1897) I.L.R., 25 Calc., 179.
(4) (1904) I.L.R., 26 All., 447.

during the pendency of a mortgagee's suit for sale, purchased the mortgage property in execution of a simple decree for money was bound by the proceedings and the decree in the suit."

A still earlier decision of this Court, *Hukm Singh* v. *Zauki Lal* (1), laid down that a purchaser *pendente lite*, being bound by the decree against the persons through whom he claimed could not be permitted to go behind the decree so as to show that there was an error patent on the face of the decree.

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With these authorities behind me I take the view that a transferee *pendente lite* is bound by the decree just as much as if he were a party to the suit and, if he is bound by the decree, he must be bound by the whole decree and is not at liberty to take advantage of one part of the decree and repudiate another part. The principle appears to be that a person who takes a transfer from any of the parties to a pending litigation thereby puts himself in privity with the suit, and must be treated, not as a stranger to the suit, but as a party to it and consequently bound by the terms of the decree in full.

It is true that in the case now being considered the final decree which was passed by this Court was founded upon a compromise. But that fact does not interfere with the application of the doctrine of *lis pendens*. A decree based upon a compromise is just as much binding as a decree founded upon a decision upon the merits. I may refer in this connection to the Full Bench decision of the Madras High Court, *Annamali Chettiar* v. *Malayandi Appaya* (2). And I also note that this matter was not contested before us.

Applying the above principles to the case before me, I am of opinion that the plaintiffs in this mortgage suit can enforce their mortgage only against that moiety of the property which the High Court's decree awarded

(1) (1884) I.L.R., 6 All., 506. (2) (1906) I.L.R., 29 Mad., 426.

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to Damodar Das. Neither the latter nor his representatives who are impleaded as defendants can complain that the enforcement of the mortgage against the property in their hands "affects" the rights of Damodar Das under the High Court's decree. On the contrary the mortgage would, in this way, be enforced in strict accordance with the terms of the decree.

On the other hand, that decree by its terms has relieved the moiety share awarded to Tori and Duli of all liability for the discharge of the mortgage-debt now sought to be enforced; it has also absolved Tori and Duli from all personal liability for this debt, and the declarations to this effect are an integral part of the High Court's decree which, for the reasons given above, is binding upon the transferee *pendente lite* to the full extent of its terms.

I cannot accept the argument that Tori and Duli or their representatives are debarred from availing themselves of these declarations on the ground that by doing so they are seeking to derogate from their own grant. They are, in my opinion, entitled to say that under the decree both they and their property stand free of all liability for this claim; and a mortgagee who takes a precarious transfer from one of the parties to a pending suit, and who knew, or must be taken to have known, that his transfer was subject to the result of the litigation then pending ought not to be heard to say that his transferor is seeking to derogate from his own grant because the decree which concludes the litigation has deprived the transferor of a portion of the property to which he could still make title at the date of the mortgage.

For these reasons I hold that the appeal should be allowed in part and that the plaintiff should be given a decree for sale against Damodar Das and his representatives in respect of the moiety share of the mortgaged property

in their possession. I would dismiss the suit as against the representatives of Tori and Duli with costs.

BY THE COURT.—The members of this Bench have differed on the question whether, under the circumstances set forth above, the plaintiffs are entitled to enforce their mortgage against the half share of Tori and Duli, or the half share of Damodar Das, or both, or neither. Accordingly, under section 98 of the Code of Civil Procedure we refer the question as to what reliefs the plaintiffs are entitled to in this case, to one or more of the other Judges of this Court, whom the Hon'ble the CHIEF JUSTICE may select.

The point of law having been referred to MUKERJI, J., his Lordship delivered the following judgement :—

MUKERJI, J.—This First Appeal was before two learned Judges of this Court for disposal. They differed on a point of law and that question alone has been referred for my opinion.

The facts involved, so far as I am concerned, are these. Two persons, Tori and Duli, claimed certain properties as belonging to one Than Chand against one Damodar Das and others. Damodar Das was the principal claimant of the property on the other side. The suit was instituted in 1908 and was decided in the then plaintiffs' favour on the 21st of February, 1911. After this decree was passed in their favour Tori and Duli mortgaged an 8 biswa share in the village Urena to one Wahid-ud-din, the predecessor in title of the present plaintiffs. A first appeal was filed by Damodar Das in this Court and it was settled by a compromise arrived at on the 7th of March, 1913. It was agreed as between Tori and Duli on one side and Damodar Das on the other that certain properties, including a half share in the 8 biswa of Urena, should go to Tori and Duli and they should discharge a certain debt due to one Mathura

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Prasad. Certain other properties, including the other half share in the 8 biswa of Urena, were given to Damodar Das and he agreed to discharge, among other debts, the debt due to Wahid-ud-din (the name of Wahid-ud-din appears to have been wrongly given as Shafi-ud-din in the compromise). It was further agreed that, so far as the debts undertaken to be paid by Damodar Das were concerned, neither Tori nor Duli nor their properties were to be liable.

The plaintiffs have brought the suit, out of which this appeal has arisen, to recover Rs. 11,000 and odd by sale of the entire 8 biswa share mortgaged to Wahid-ud-din on the 3rd of August, 1911. The entire 8 biswa share has passed out of the hands of Tori and Duli and Damodar Das. Tori and Duli's share (4 biswas) is now owned by the defendant second party, Ram Sarup, and the share of Damodar Das is now owned by the defendants third party. There are certain subsequent mortgagees as well as *pro formâ* defendants in the suit. The question on which the learned Judges differed was whether the 4 biswas given by the compromise decree to Tori and Duli was liable in the hands of the present owners and transferees or whether the 4 biswas given by the compromise decree to Damodar Das was liable. The learned Judges appear to have been agreed that the entire 8 biswas could not be sold.

Before me, Mr. *Malik* contended that the entire 8 biswas could be sold at the instance of the plaintiffs. There is no force in this contention, for reasons to be presently stated in deciding the point referred to me for opinion.

To start with, no party who has made a transfer to another is entitled to say that the transferee has no right to the property. This is elementary law. This principle has been stretched so far as to enact a rule of law that

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where a person, without owning a property, purports to transfer it, he would be bound to make good the transfer, if later he acquires that property, vide section 43 of the Transfer of Property Act. It seems to me, therefore, consistent with principles that Tori and Duli, who made the mortgage, should make it good by means of any property that may be in their hands out of the property mortgaged by them. Now, is there any principle or rule of law which enables Tori and Duli or their representatives to say that by reason of certain things that have since happened they are not liable to make good their promise as contained in the deed of mortgage? The law on the point under consideration has been embodied in section 52 of the Transfer of Property Act, which, for the purposes of the Indian Courts, contains the entire law on the subject of *lis pendens*. If section 52 of the Transfer of Property Act should enable Tori and Duli to say that they are entitled to plead that section as a bar to the enforcement of the mortgage against any property in their hands, they will succeed, otherwise not.

Looking to section 52 of the Transfer of Property Act, it runs as follows (omitting unimportant portions) :—

"During the active prosecution . . . of a contentious suit . . . . in which any right to immoveable property is directly and specifically in question, the property cannot be transferred . . . . by any party to the suit . . . . so as to affect the rights of any *other* party thereto under any decree or order which may be made therein . . . . ".

This rule lays down that when a piece of immoveable property is in contest between two parties, one of the parties cannot transfer it so as to prejudice the other party if the result of the litigation is in favour of the other party. It will be noticed that the rule is enacted entirely for the benefit of the "other party" and not for the benefit of the party making the transfer. The reason seems to be clear. The party who makes the

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transfer is bound by it, while the question is whether the successful party in the litigation, who is not the party making the transfer, is also to be bound by the transfer. The rule is that the "other party" is not to be so bound. There is, therefore, nothing in section 52 of the

Mukerji. J. Transfer of Property Act which would enable Tori and Duli to say to Wahid-ud-din: "We are not going to keep our contract and make good our word on account of the provisions of section 52 of the Transfer of Property Act."

In various cases a transferee *pendente lite* has been described as the representative of his transferor so far as the result of the suit is concerned. This description would be perfectly good as between the transferee and the party other than the transferor. As between the transferee and the party who is not the transferor, the transferee *pendente lite* cannot claim a higher right than his transferor. In this sense, no doubt, the transferee is a representative of the transferor. But I have not come across any case in which a question as to rights may have arisen, *as between the transferor and the transferee* and it has been said that the transferee is a representative of the transferor. As between these two, there is no question of representation. They are parties to a contract, they are bound by the terms. In my opinion we have to look for the whole law on the subject to the provisions of section 52 of the Transfer of Property Act alone and not elsewhere.

It will be noticed from the statement of facts made above, that Damodar Das made only a personal covenant to pay the debt due to Wahid-ud-din. He did not even say that Wahid-ud-din's debt was a mortgage-debt. (I sent for the record of First Appeal No. 168 of 1911 and examined the compromise in the case). The promise on the part of Tori and Duli to pay Mathura Prasad's

debt was purely a personal promise and so was the promise on the part of Damodar Das. Nowhere in the compromise was any property earmarked as being liable for the debts of Mathura Prasad or Wahid-ud-din or Jammu. It follows therefore that under the compromise decree Damodar Das got an absolute title to a 4 biswa share out of 8 biswas of Urena mortgaged to Wahid-ud-din. Wahid-ud-din being a transferee *pendente lite* could not touch the property which Damodar Das, being the "other party" to the litigation, got under the terms of the decree. This is the reason why the 4 biswas in the hands of defendants third party cannot be touched. Further, the undertaking on the part of Damodar Das to pay the debt of Wahid-ud-din was an undertaking which could not be enforced at the instance of Wahid-ud-din who was not a party to the contract or to the decree. He obtained a mortgage of 8 biswas and he could always insist on the terms of his contract being made good by his mortgagors or their representatives, so far as it lay in their power to do so.

My opinion therefore is that the mortgage in suit is enforceable against only those 4 biswas of Urena which are now held by the representatives of Tori and Duli and the mortgage is not enforceable against the 4 biswas share given to Damodar Das under the compromise decree.

[The case then was put up before LINDSAY and SULAIMAN, JJ., who decreed the claim against the 4 biswas of mauza Urena which were held by the representatives of Tori and Duli, and dismissed it against the 4 biswa share given to Damodar Das under the compromise decree.]

Decree modified.

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April, 30.

Before Mr. Justice Mukerji and Mr. Justice Bennet.

TAMIZ-UN-NISSA BIBI (DEFENDANT) *v.* SYED MUHAMMAD HUSAIN (PLAINTIFF).*

Civil Procedure Code, section 11—Res Judicata—"*Might and ought*"—*First suit for possession based on title—Second suit for possession as mortgagee—Two courts of different grades—Second suit comprising property claimed in first suit as well as other claims against other defendants.*

R mortgaged with possession a certain property to *M*. After *R's* death, *F*, who had inherited a two-fifths share in the property, sold without authority the entire property to the mortgagee *M*. *T*. who had inherited a one-fifth share, brought a suit in the Munsiff's court for possession of her share. Her title was proved and the suit was decreed, *M* not having raised the defence that in any case he was entitled to retain possession as usufructuary mortgagee. Thereafter *M's* name was removed from the revenue records as a mortgagee, and he brought a suit in the Subordinate Judge's court against *T* and the other heirs of *R*, for recovery of possession as mortgagee over a three-fifths share of the property (excluding the two-fifths share of *F*, of which *M* had become full owner).

Held, that so far as *T* and her one-fifth share were concerned, the suit was barred by the principle of *res judicata*.

THE facts of the case sufficiently appear from the judgement of the Court.

Babu *Piari Lal Banerji* and Babu *Hem Chandra Mukerji*, for the appellant.

Maulvi *Haidar Mehdi*, for the respondent.

MUKERJI and BENNET, JJ. :—The only question before us is whether a part of the claim is not barred on the ground of *res judicata*. One Riyaz Husain was the owner of a certain property which he mortgaged with possession to the respondent, Syed Muhammad Husain. He died, leaving him surviving three daughters and one son. The son, Faiyaz Husain, sold the entire property

*Second Appeal No. 1204 of 1925, from a decree of A. G. P. Pullan, District Judge of Moradabad, dated the 14th of April, 1925, reversing a decree of Hanuman Prasad Verma, Subordinate Judge of Bijnor at Moradabad, dated the 9th of October, 1923.

to the respondent, Muhammad Husain, alleging that he was the sole heir of his father. Out of the sum of Rs. 4,000, Rs. 2,400 went to pay off the mortgage and the balance was paid to the vendor. Tamiz-un-nissa, the appellant before us, a sister of Faiyaz Husain, brought a suit (No. 336 of 1920) in the court of the Munsif of Moradabad for recovery of her one-fifth share of the inheritance. Muhammad Husain, in that suit, in his defence, did not set up his usufructuary mortgage. The result was that the suit of Tamiz-un-nissa was decreed for possession. The respondent, Muhammad Husain, has now brought the suit, out of which this appeal has arisen, for recovery of possession over three-fifths share in Riyaz Husain's property, on the ground that he was entitled to possession of this share as a mortgagee. Faiyaz Husain's legitimate share in his father's property was two-fifths. The plaintiff has, evidently, kept this two-fifths as his property on the ground that his vendor was the owner of this share.

In the court of first instance Tamiz-un-nissa pleaded that the suit was barred on two grounds, namely, *res judicata* and estoppel. This defence found favour in the court of first instance and the whole suit was dismissed. On appeal by the plaintiff, the learned District Judge set aside the decree of the court of first instance and decreed the entire suit. He was of opinion that the earlier suit did not operate as *res judicata*, and that there was no question of estoppel.

In this Court it has been urged that so far at least as Tamiz-un-nissa is concerned the claim as regards her one-fifth share is barred as *res judicata*.

As a matter of history, it appears that the appeal came up before a Bench of this Court and was heard and decreed *ex parte*. That decree has been set aside at the instance of the respondents and the appeal has now come up before us for disposal.

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The only question that has been urged before us is that of *res judicata*. It appears to us that in the former suit (No. 336 of 1920) it was the duty of the respondent to urge that if he could not succeed on the ground of his purchase from Faiyaz Husain he was, at any rate, entitled to continue to be in possession as the mortgagee from the father, Riyaz Husain. This was a defence which, in our opinion, Muhammad Husain not only might but ought to have taken in the earlier suit.

The learned District Judge was of opinion that it was only because Tamiz-un-nissa's suit succeeded that a cause of action arose to Muhammad Husain to bring the second suit. We do not agree with this contention. Two defences, as we have already said, were open to the respondent and he ought to have taken both the defences.

The second ground on which the judgement of the lower appellate court proceeded was that the second suit brought by Muhammad Husain was not cognizable by the Munsif because its valuation was more than Rs. 1,000. This is perfectly true, but so far as Tamiz-un-nissa was concerned her suit was rightly brought in the court of the Munsif of Moradabad. The three sisters did not claim one under another, and if there was any claim by the other sisters they were all independent claims. It has been discovered now that, as a matter of fact, only one suit was brought, and that by Tamiz-un-nissa. The revenue court removed the name of the respondent, from the record, as a mortgagee. The plaintiff may have a cause of action against the other sisters of Tamiz-un-nissa, but, certainly so far as Tamiz-un-nissa herself was concerned, there was no valid ground on which Muhammad Husain could bring his suit against her in the court of the Subordinate Judge of Moradabad. In our opinion the claim as against Tamiz-un-nissa was barred by the principle of *res judicata*.

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We are not satisfied that there was any valid reason for dismissing the entire suit of the respondent. His learned counsel tells us that he confined his claim to two-fifths share only when he appealed to the lower appellate court. Out of this two-fifths share, the claim to one-fifth share fails as against Tamiz-un-nissa. There will, therefore, be a decree as against the other respondents for one-fifth share only.

The result is that we allow the appeal in part and dismiss the plaintiff respondent's suit as against Tamiz-un-nissa in respect of one-fifth share in the entire property of Riyaz Husain. We dismiss the claim as regards a similar share on the ground that it has been withdrawn by the plaintiff. We decree the plaintiff's suit with respect to the remaining one-fifth share against the defendants other than Musammat Tamiz-un-nissa and Muhammad Husain. The appellant will have her costs in all courts.

Appeal allowed.

REVISIONAL CIVIL.

Before Mr. Justice Lindsay and Mr. Justice Kendall.

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July, 5.

RAM SARUP (DEFENDANT) *v.* HARDEO PRASAD (PLAINTIFF).*

Act No. XXVI of 1881 *(Negotiable Instruments Act), sections* 9 *and* 59*—Suit by endorsee against drawer of a cheque—"Holder in due course".*

A cheque is payable on demand and the amount becomes payable when the cheque is presented for payment to the drawee.

Where the plaintiff, on the 28th of September, took a cheque which had been drawn on the 5th of June, in good faith, for consideration, without notice of its having been dishonoured, and without having any reason to believe that there was

*Civil Revision No. 67 of 1927.

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any defect in the title of his transferor and it was found that the transferor was not a holder for value, the endorsement to him being fictitious, it was *held*, that the plaintiff was not a "holder in due course" and therefore his claim against the drawer must fail.

THIS was an application in revision against a decree of a Court of Small Causes decreeing a suit by an endorsee of a cheque against the drawer. The application was referred by DALAL, J., to a Bench of two Judges on the question, chiefly, whether the plaintiff was a " holder in due course " within the meaning of the Negotiable Instruments Act, 1881. The facts of the case sufficiently appear from the judgement of the Court.

Munshi *Panna Lal*, for the applicant.

Munshi *Ambika Prasad*, for the opposite party.

LINDSAY and KENDALL, JJ. :—This application for revision under section 25 of the Provincial Small Cause Courts Act has been referred for decision to a Bench and the question to be determined is the liability of the defendant applicant Ram Sarup in respect of a cheque drawn by him on the Allahabad Bank, Limited, on the 5th of June, 1926, and made payable to "Ram Saran or order." The amount of the cheque was Rs. 500.

On the 10th of June, 1926, the cheque was presented for payment and was dishonoured. It was proved at the trial that the drawer had no funds at credit with the Bank and that he had made no arrangement for an overdraft. Payment was refused by the Bank on the ground that it had not been arranged for.

On the 28th of September, 1926, the cheque was again presented for payment and again dishonoured on two grounds: (1) that payment had not been arranged for by the drawer and (2) that the endorsement of the payee was wanting. It is not clear who presented the cheque on this second occasion. Obviously it was some person other than the payee. There was the evidence

of a clerk of the Bank that it was presented by Hardeo Prasad, the plaintiff in this suit, but the Judge disbelieved it. His finding is that Hardeo Prasad did not take the cheque to the Bank and had no notice of dishonour.

A third presentation was made on the 6th of October, 1926, on behalf of the Beopar Sahaik Bank to which the cheque had been endorsed the previous day by Hardeo Prasad. This time payment was refused on the ground that it had been stopped by the drawer.

As regards the stopping of payment the court below did not believe the statement of the drawer or of the Bank clerk that the order to stop had been received on the 10th of June, 1926, and this is clearly right, for the refusal of the Bank to pay either on the 10th of June or the 28th of September was not based upon any stop order. And on the 10th of June, at any rate, such an order would have been without meaning, for the drawer had no funds at the Bank and had made no arrangement with the Bank for liquidation of the cheque.

The endorsements on the cheque require some notice. The first purports to bear date the 10th of August, 1926, and is by Ram Saran (the payee) in favour of Babu Ram. The Judge held that this was not a genuine endorsement, for, according to the Bank evidence, there was no endorsement on the cheque when it was presented for payment on the 28th of September.

On this latter date Babu Ram endorsed to Hardeo Prasad the plaintiff, and he in turn endorsed to the Beopar Sahaik Bank on the 5th of October. On the following day this Bank made the third presentment of the cheque and payment, as stated above, was refused on the ground that the drawer had stopped it. The Judge believed that Hardeo Prasad had been deceived by his endorser, Babu Ram, and held that Hardeo Prasad having given value

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and having no notice that the cheque had been dishonoured, was a holder in due course and entitled to recover from the previous parties, including the drawer.

It is argued before us that the plaintiff was not a holder in due course, regard being had to the language of section 9 of the Negotiable Instruments Act, according to which the holder in due course of a cheque means a person who for consideration became the possessor of the cheque (if payable to bearer), or the payee or endorsee of the cheque (if payable to order) before the amount mentioned in it becomes payable, and who had no sufficient cause to believe that any defect existed in the title of the person from whom he derived his title.

The lower court finds that Hardeo Prasad had no notice of any defect in the title of his transferor.

But it is argued that the first of the two conditions is not satisfied because Hardeo Prasad did not become the endorsee before the amount specified in the cheque became payable. A cheque, it is said, is payable on demand and the amount in this instance became payable on the 5th of June, the date on which the cheque was drawn, whereas the endorsement was not made to Hardeo Prasad till the 28th of September.

Under the English law (Bills of Exchange Act, 1882, section 29) no person can be a holder in due course unless he became the holder of the bill before it was overdue. And for the purposes of the section a bill payable on demand (which includes a cheque) is deemed to be overdue when it appears on the face of it to have been in circulation for an unreasonable length of time. It is clear, therefore, that according to English law the holder of a stale cheque would not be treated as a holder in due course.

The law in India is not so definite as the law in England, and the expression "overdue" is not to be

found in section 9 of the Negotiable Instruments Act. According to section 9 no one can be a holder in due course unless he takes it " before the amount mentioned in it became payable."

A cheque is payable on demand : the amount becomes payable when the cheque is presented for payment to the drawee.

In the present case the cheque was presented at the Bank on the 10th of June, 1926, and the amount became payable on that date. Hardeo Prasad did not become the holder till long after that date and he cannot, therefore, be a holder in due course under section 9.

It was not sufficient to find that he took the cheque in good faith, for consideration, without notice of dishonour and without having any reason to believe that there was any defect in the title of his transferor, Babu Ram. On the face of it the cheque was stale and this was, or ought to have been, sufficient notice to Hardeo Prasad that payment was overdue.

The case is governed by section 59 of the Negotiable Instruments Act and all that Hardeo Prasad acquired was the rights in the cheque of Babu Ram.

The finding of the Judge appears to be that Babu Ram was not a holder for value and that the endorsement to him was fictitious.

For these reasons the plaintiff's case against Ram Sarup, the drawer, must fail.

The application for revision must, therefore, be allowed. The claim against Ram Sarup must stand dismissed. No order as to costs in either court, it being admitted that when Ram Sarup drew the cheque he had no funds in the Bank to meet it.

Application allowed.

APPELLATE CIVIL.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Lindsay.

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BALMAKUND (PLAINTIFF) *v.* RAMENDRA NATH GHOSE (DEFENDANT).*

Act No. VI of 1881 (*Probate and Administration Act*), *section* 3—*Will—Probate—Application to admit to probate a draft will neither signed nor attested.*

Draft instructions given by a testator to a lawyer, or a draft will prepared on such instructions can be treated as a will so as to allow grant of probate.

Aulia Bibi v. *Ala-ud-din* (1), *Janki* v. *Kallu Mal* (2) and *Sarabai Amibai* v. *Mahomed Cassum* (3), followed.

THIS was an appeal from an order of the District Judge of Allahabad, refusing to admit to probate a document which was the draft of a will prepared by a vakil according to instructions given to him by the testator. The facts of the case are fully set forth in the judgement of the Court.

Pandit *Shiam Krishna Dar* (with him Dr. *Kailas Nath Katju*), for the appellant.

Babu *Piari Lal Banerji*, for the respondent.

MEARS, C.J., and LINDSAY, J. :—The question to be decided in this First Appeal is whether the document which was exhibited as Exhibit 4 in the court below, and which was propounded as being the last will of Ram Rup Ghose, ought to have been admitted to probate by the District Judge. Ram Rup Ghose was once a head-master and had been living for a number of years in Allahabad after his retirement on pension. It is admitted on both sides that on the 2nd of February, 1920, Ram Rup Ghose executed a will which was registered. At that

*First Appeal No. 372 of 1924, from a decree of D. C. Hunter, District Judge of Allahabad, dated the 25th of April, 1924.

(1) (1906) I.L.R., 28 All., 715. (2) (1908) I.L.R., 31 All., 236.
(3) (1918) I.L.R., 43 Bom., 641.

time the members of Ram Rup Ghose's family, who were alive and in whom he was necessarily interested, were his wife, his son Ramendra Nath Ghose, his daughter-in-law Mirnalini Debi (the widow of a deceased son) and her three children (two sons and one daughter). By his registered will, Ram Rup arranged for the distribution of his property after his death. He appointed four executors to his will, and directed that one-half of the annual income of his estate should be paid to his wife and his son Ramendra Nath until his wife's death. After his wife's death one-half of the estate was to be made over to his son Ramendra Nath, subject to a deduction of Rs. 2,000 which was to go towards the marriage expenses of the testator's grand-daughter Kanak Champa Debi. The other half of the income was to be devoted to the maintenance of the testator's daughter-in-law Mirnalini Debi and her children. Provision was made for the education of the two grandsons and it was provided that when his grandsons attained full age, half of the estate was to vest in them, subject to a charge for the maintenance of their mother Mirnalini Debi, and subject to a contribution of Rs. 2,000 towards the marriage expenses of the grand-daughter. The will also provided that while the wife of the testator was alive, the family were to live with her. The property disposed of by the will consisted of Government Promissory Notes, shares in certain companies, a one-third share in two houses in Mirzapur and certain moveable property.

The document Exhibit 4, which was brought into court by Babu Balmakund, one of the executors, purported to revoke this earlier will. Exhibit 4, as it stands, is the draft of a will. It is not pretended that the testator, the deceased Ram Rup Ghose, who died on the 25th of September, 1923, ever signed this document, nor again does it bear the attestation of any witnesses. Nevertheless it was put forward

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as being the last will of Ram Rup Ghose, the case for the applicant being that this document, although informal in the manner just indicated, nevertheless had been prepared at the express request of Ram Rup, and with an express declaration by him that it contained his last wishes regarding the disposal of his property.

The document made a different distribution of the property to that which was provided in the registered will of the 2nd of February, 1920. The son Ramendra Nath was given a one-third share in a house in Mirzapur and was also given certain shares in the Tata Iron and Steel Works of the face-value of about Rs. 3,000. The income of the rest of the property was to be devoted to the maintenance of the daughter-in-law and grandchildren of the testator and the remaining corpus of the property was to vest in the grandsons on their attaining majority, subject to the maintenance of their mother. The same provision was made in this will as in the earlier will, namely, that Rs. 4,000 was to be spent on the marriage of the testator's grand-daughter. There was a gift over to the Kayestha Pathshala in certain events. Provision was also made by which certain ornaments, which belonged to the testator's wife, were to be given to the grandsons and, lastly, it was declared in clause 14 of this document that the earlier registered will of the 2nd of February, 1920, had been cancelled.

The grant of probate was opposed by the son of the testator, Ramendra Nath. It was not denied that the draft, Exhibit 4, as brought into court, had been prepared under instructions given by Ram Rup, but it was said that the will of the 2nd of February, 1920, had never been revoked and there never had been any intention to revoke it. It was suggested that this draft Exhibit 4 had been prepared merely for the purpose of pacifying the daughter-in-law Mirnalini, who, it was said, had acquired an ascendency over Ram Rup. It was said that the draft did

not represent the last wishes of the testator and that the preparation of the draft will could not amount to a revocation of the earlier will. It was also pleaded that no execution of the will had taken place and that Ram Rup never had any real intention to make a new will and to revoke the earlier one.

Under section 3 of the Probate and Administration Act a will is defined as being the legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death. It is not disputed that in the case of a Hindu, as Ram Rup Ghose was, the declaration may be legal although it is not signed by the testator, nor attested by witnesses, and it has been held in a number of cases that the draft instructions given by a testator to a lawyer, or a draft will prepared on such instructions can be treated as a will so as to allow grant of probate. We may refer in this connection to three cases, *Aulia Bibi* v. *Ala-ud-din* (1), *Janki* v. *Kallu Mal* (2) and *Sarabai Amibai* v. *Mahomed Cassum* (3).

Consequently if it is found that the draft Exhibit 4, though not signed by the testator and unwitnessed, does represent the last wishes of Ram Rup Ghose regarding the disposal of his property, effect must be given to it as a will, and as it contains a clause expressly revoking the registered will of the 2nd of February, 1920, the latter will must in that case be deemed to have been duly revoked.

Before discussing the evidence in the case it should be premised that Ram Rup was a well-educated man, who had been the head-master of a Government School and knew English well. There can be no question of his ability to understand a document prepared in English. One of the witnesses describes Ram Rup as having been a graduate of the Calcutta University.

(1) (1906) I.L.R., 28 All., 715. (2) (1908) I.L.R., 31 All., 236.
(3) (1918) I.L.R., 43 Bom., 641.

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[After dealing with the evidence at some length, their Lordships continued :—]

On this evidence the learned Judge seems to have come to the conclusion that it was not possible for him to say that the document Exhibit 4 represented the last wishes of Ram Rup regarding the disposal of his property after his death. There was, of course, considerable conflict in the evidence and the result of this was to leave the Judge, as he says, convinced of nothing. He seems to have thought that before Ram Rup died he had not definitely made up his mind to make a fresh disposition of his property and to cancel his previous will.

It has been very strongly argued before us by Mr. *Dar*, on behalf of the applicant for probate, that the circumstantial evidence in the case points clearly to the conclusion that Ram Rup had definitely decided to alter his will and to revoke the earlier will of 1920.

It is not to be denied that there were reasons why Ram Rup might very well wish to make a new will. In the first place, since he executed the earlier will of 1920, Ram Rup's wife had died. It was no longer necessary therefore to make provision for her. Another fact was that his son Ramendra Nath was able to earn his own living. We have also every reason to suppose that Ram Rup was most anxious to provide, as well as he could, for his grandchildren. It was for them that provision was being made in the will and not for the mother Mirnalini. There is also the fact that Ramendra Nath himself admits that there were quarrels between him and his sister-in-law, quarrels which might very well have led Ram Rup to suppose that after his death Ramendra Nath would not be well disposed towards his brother's widow.

A good deal has been said about the conduct of Ram Rup himself and in particular as to the inference which

might be drawn from the fact that Ram Rup had never signed this draft document, Exhibit 4. There can be no doubt that he had read the draft, that he understood it, and had made corrections in it, and so far as we are able to understand, Ram Rup was quite in earnest about the preparation of this deed. It is difficult to suppose that he was taking all these pains if he did not seriously intend to make a new will.

As regards the fact that Ram Rup did not sign the will, it is to be remembered that early in September he had handed over the draft of the new will to his vakil, and asked him to make arrangements for the deposit of the document with the District Registrar. There can, we think, be no doubt that Ram Rup fully trusted his vakil in this matter and left it to him to do all that was necessary in order to get the will deposited in court. From early in September the vakil was in possession of Exhibit 4 and also two fair copies of the same, and it seems to us most likely that Ram Rup believed that all steps would be taken in order to carry out his wishes. Before, however, any deposit was made Ram Rup died. We do not think that it ought to be concluded from this conduct of Ram Rup that he was wavering or uncertain in his intentions. That conclusion might have been possible if it turned out that the draft document had been in his possession right up to the time of his death, but the explanation is that it was not in his possession—it was in the possession of the vakil. It was most reprehensible on the part of the vakil not to take immediate steps for the deposit of this document, and the excuse he has given, namely, that the Judge was busy in dealing with the Karari case was no excuse at all. Had an application been made to the District Judge for the deposit of this will, he would have been bound to entertain it at once, whether he was trying the Karari case or not. In short

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it is not possible to infer from the negligence of the vakil that Ram Rup, who was the author of this document, was in any way in an uncertain state of mind, and to hold that for this reason effect should not be given to his wishes as contained in this document Exhibit 4.

For these reasons we have come to the conclusion that the Judge ought to have pronounced in favour of the document, Exhibit 4, and to have granted probate of it as being the last will of Ram Rup Ghose.

This case has, we admit, been a difficult one, and when it was first opened, it appeared to us that the appeal stood very little chance of success. We have, however, to acknowledge the very able argument of Mr. *Dar*, who has removed all doubts which we might have been disposed to entertain in this matter, and has convinced us that the document, Exhibit 4, is a genuine document and was intended by the deceased Ram Rup to take effect as his last will.

We, therefore, allow this appeal, set aside the order of the District Judge and grant the application for probate of the document, Exhibit 4. The applicant is entitled to the costs both in this Court and in the court below.

Appeal allowed.

Before Mr. Justice Boys and Mr. Justice Kendall.

BISHESHAR NATH AND OTHERS (DECREE-HOLDERS) *v.* CHANDU LAL AND OTHERS (JUDGEMENT-DEBTORS).*

1927 *July*, 6.

Civil Procedure Code, order XXXIV, rule 6—Mortgage—Decree—Mortgaged property ceasing to be available for sale through no fault of the mortgagee—Mortgagee's right to a personal decree.

Where property the subject of a suit for sale on a mortgage has ceased to be available for sale owing to no fault of the mortgagee, the mortgagee is entitled to a personal decree, the whole right to which the mortgagee has had all along, but which right has merely been suspended owing to the fact that his remedy against the mortgaged property was not yet shown to have been exhausted or to be otherwise unavailable. Such a decree is not within order XXXIV, rule 6, of the Code of Civil Procedure, nor based by analogy with order XXXIV, rule 6, on any legal fiction that there has been a sale.

Ram Raghubir v. *Imami Begam* (1), *Sheo Din* v. *Bhawani* (2), and *Brij Behari* v. *Indarpal* (3), followed. *Pirbhu Narain Singh* v. *Amir Singh* (4), *Bihari Lal* v. *Bisheshar Dayal* (5), *Darbari Mal* v. *Mula Singh* (6), *Kedar Nath* v. *Chandu* (7), *Satish Ranjan Das* v. *Mercantile Bank of India, Ltd.* (8) and *Badal Singh* v. *Debi Saran Dhar Dube* (9), referred to.

THIS was a decree-holder's application purporting to be under order XXXIV, rule 6, of the Code of Civil Procedure and asking for a decree, not for a balance due after a sale but for the total amount of the decree, on the ground that any sale then applied for and carried out would be inevitably infructuous owing to no fault of the

*Second Appeal No. 1246 of 1925, from a decree of A. G. P. Pullan, District Judge of Moradabad, dated the 1st of April, 1925, reversing a decree of Hanuman Prasad Verma, Subordinate Judge of Bijnor at Moradabad, dated the 8th of October, 1923.

(1) (1909) 9 Indian Cases, 403.
(2) (1911) 9 Indian Cases, 752; 14 Oudh Cases, 62.
(3) (1920) 57 Indian Cases, 967; 23 Oudh Cases, 145.
(4) (1907) I.L.R., 29 All., 369.
(5) (1912) 9 A.L.J., 569.
(6) (1920) I.L.R., 42 All., 519.
(7) (1903) I.L.R., 26 All., 25.
(8) (1917) I.L.R., 45 Calc., 702.
(9) (1927) I.L.R., 49 All., 506.

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mortgagee decree-holder. The facts were that the judgement-debtor executed a simple mortgage in favour of the present decree-holder on the 16th of January, 1908. On this mortgage a suit was instituted on the 20th of November, 1913, and a preliminary decree was obtained on the 22nd of December, 1913, *ex parte*. A third party brought a suit against the mortgagor, to which he also made the mortgagee a party, for a declaration that the mortgagor had no title in the property mortgaged, and obtained a decree on the 15th of December, 1915. On the 23rd of September, 1916, the mortgagee obtained a final decree.

The question that then arose for the mortgagee was whether he was to apply for sale under that decree, or what was his remedy, in view of the fact that it had already been declared in a suit to which he was a party that his mortgagor had no title. Presumably he took some steps, between the 23rd of September, 1916, and the 8th of September, 1922, to keep his decree alive, for no question was raised as to that decree having become barred by limitation.

The trial court gave the decree-holder a decree under order XXXIV, rule 6, relying on the cases of *Brij Behari* v. *Indarpal* (1) and *Pirbhu Narain Singh* v. *Amir Singh* (2). The lower appellate court set aside the decree of the trial court and dismissed the application, relying on *Behari Lal* v. *Bisheshar Dayal* (3) and *Darbari Mal* v. *Mula Singh* (4).

The decree-holders appealed to the High Court.

Babu *Piari Lal Banerji*, for the appellants.

Munshi *Panna Lal* and Babu *Surendra Nath Gupta*, for the respondents.

The judgement of the Court (BOYS and KENDALL), JJ.)., after setting out the facts as above, thus continued :—

(1) (1920) 57 Indian Cases, 967.
(2) (1907) I.L.R., 29 All., 369.
(3) (1912) 9 A.L.J., 569.
(4) (1920) I.L.R., 42 All., 519.

We have considered the following cases :—*Kedar Nath* v. *Chandu* (1), *Ghafur Hasan Khan* v. *Muhammad Kifayat-ullah Khan* (2), *Pirbhu Narain Singh* v. *Baldeo Misra* (3), *Pirbhu Narain Singh* v. *Amir Singh* (4), *Ram Raghubir* v. *Imami Begam* (5), *Sheo Din* v. *Bhawani* (6) *Bihari* v. *Bisheshar* (7), *Satish Ranjan Das* v. *Mercantile Bank of India, Ltd.* (8), *Brij Behari* v. *Indarpal Singh* (9), *Darbari Mal* v. *Mula Singh* (10) and *Badal Singh* v. *Debi Saran Dhar Dube* (11) but, in the view that we take, it is not necessary to consider them in detail.

Two considerations are manifest at the outset. Firstly, that if the decree-holder has, apart from his having allowed his remedy to become barred by limitation, no remedy, he will be the victim of an injustice. Secondly, that it is only by doing violence to the plain language of order XXXIV, rule 6, that an application, such as the present where there has been no sale, can be held to be supported by the terms of that rule.

It would seem to be the first of these considerations which has led in some of the decided cases, and, in the seeming absence of any other remedy, to decisions that applications similar to the present one come within order XXXIV, rule 6. This is the position which we have to consider.

Where the right to a personal decree is barred by limitation at the time of filing the suit, it has gone altogether and cannot be revived at all, either on the discovery that the mortgagor had no title to any of the property, or after a sale of the whole or part of the property has resulted in a deficiency. The mortgagee has

(1) (1903) I.L.R., 26 All., 25.
(2) (1905) I.L.R., 28 All., 19.
(3) (1906) I.L.R., 29 All., 260.
(4) (1907) I.L.R., 29 All., 369.
(5) (1909) 9 Indian Cases, 403.
(6) (1911) 14 Oudh Cases, 62; 9 Indian Cases, 752.
(7) (1912) 9 A.L.J., 569.
(8) (1917) I.L.R., 45 Calc., 702.
(9) (1920) 57 Indian Cases, 967.
(10) (1920) I.L.R., 42 All., 519.
(11) (1927) I.L.R., 49 All., 506.

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deliberately chosen to let that right go and there is an end of the matter.

Where, however, the right to a personal decree is not barred by limitation at the time of filing the suit, what is the position?

The mortgagee can get a decree for sale, and, though it is of no immediate use to him, no harm is done if that decree is combined with a conditional decree under order XXXIV, rule 6—*Jeuna Bahu* v. *Parmeshwar* (1)—but he cannot get at the same time as his decree for sale an unrestricted personal decree.

It may be noted that there is apparently no statutory basis for refusing the immediate grant of an unrestricted personal decree, but the courts have evolved and declared this rule, for it would clearly be absurd to give the mortgagor the time allowed for payment under a decree for sale and at the same time allow the mortgagee to proceed *instanter* under a personal decree.

What, then, happens to the mortgagee's right to an unrestricted personal decree if he has it at the date of suit but cannot be allowed to take it at the same time as his decree for sale?

It has always been understood and conceded that the right to a personal decree is not wholly destroyed, for a right to a personal decree, at least under certain conditions, is merely suspended until those conditions are fulfilled, as is clearly indicated by order XXXIV, rule 6. This is manifest and beyond dispute. What reason is there for holding that the rule which we have quoted keeps in suspension only so much of the right to a personal decree as can, in the necessary conditions, be later exercised under order XXXIV, rule 6, and destroys the remainder of the right? In our view there is none.

(1) (1918) I.L.R., 47 Calc., 370.

As it appears to us, the rule does not arbitrarily destroy *any part* of the right to a personal decree; *the whole right* remains; the rule merely suspends *the whole right* during and because of the existence of the remedy against the mortgaged property, and it follows that, as soon as that remedy has been exhausted, or, without any blame attaching to the decree-holder, has ceased to exist or is discovered to have never existed, the obstacle to the granting of a personal decree is removed and the mortgagee is free to claim his whole right to an immediate personal decree and he can exercise it by an application in the suit for a personal decree.

Order XXXIV, rule 6, is in accordance with this rule and is merely an illustration of its working, and is only inserted, not because it gives some exceptional right, but to deal with the case of a deficiency, as the suitable complement of rule 4 (1) and rule 5 (2) which direct what is to be done with a surplus.

It may be noted that the unqualified declaration of the decree-holder's right to the full amount of money (App. D, Form 5) further indicates that it is the whole right to a personal decree which is merely kept in suspension.

This broad principle governs alike cases where there has been no sale and where there has been a sale leaving an unsatisfied balance.

Where the remedy against the mortgaged property under a sale decree is shown to be no remedy at all, e.g., by the discovery that the mortgagor never had any title to any of the property, or by the mortgagor losing his title to the property, or for any other cause not due to the fault of the mortgagee, the reason for suspending the right to a personal decree has disappeared and the mortgagee can immediately, on the discovery, apply in the suit for a personal decree; not by calling in aid a legal

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fiction that there has been a sale and applying order XXXIV, rule 6, (which in terms applies only where there has been a sale), but on the straightforward ground that the reason for keeping in suspension the right to a personal remedy has gone.

Similarly, where the remedy against the property is exhausted by the sale of the whole of the property, or by so much of the property as remains available for sale, and there remains a deficit, a new right to a personal decree does not come into being, but the existing right ceases to be suspended, the objection to the exercise of such a right being now removed.

We may refer here to the forms given in the Code of Civil Procedure. The plaint asks for a personal decree, " claims payment " (App. A. No. 45), and, in default, a decree for sale, etc. The decree does not give him a personal decree or any form of order for payment, but merely "declares the amount due" and gives an opportunity for payment.

We would, therefore, concur in the view that has been held in such cases as *Ram Raghubir* v. *Imami Begam* (1), *Sheo Din* v. *Bhawani* (2) and *Brij Behari* v. *Indarpal* (3), that where the whole of the property has ceased to be available for sale owing to no fault of the mortgagee, the mortgagee is entitled to a personal decree, though we do not hold that decree to be one within order XXXIV, rule 6, or even to be based by analogy with order XXXIV, rule 6, on any legal fiction that there has been a sale, but to a personal decree the whole right to which the mortgagee has had all along but which right has been merely suspended owing to the fact that his remedy against the mortgaged property was not yet shown to have been exhausted or to be otherwise unavailable.

(1) (1909) 9 Indian Cases, 403. (2) (1911) 9 Indian Cases, 752; 14 Oudh Cases, 62.

(3) (1920) 57 Indian Cases, 967; 23 Oudh Cases, 145.

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In the present case the suit was filed on a date when the right to a personal decree was not yet barred; it was specifically asked for as the first relief in the plaint. Applying the principles above stated, the mortgagee was entitled to apply in the suit for a personal decree as soon as it became known that his remedy by sale of the mortgaged property was exhausted, in this case by having become inevitably infructuous.

But now the mortgagee in the present case is met with a real difficulty. He admittedly knew as long ago as the 15th of December, 1915, that the mortgaged property was not available to him; it was on that date that, in accordance with the view that we have expressed above, the obstacle to his applying in the suit for a personal decree was removed and on that date he became entitled to apply for an ordinary personal decree. The fact that he asks for a decree under order XXXIV, rule 6, which we have held inapplicable, would not be adequate reason for refusing him an ordinary personal decree. But on the 15th of December, 1915, he had all the knowledge of the facts upon the basis of which he now asks for a personal decree and could have proceeded immediately. His application is now clearly barred by limitation.

The appeal is dismissed with costs.

Appeal dismissed.

Before Sir Grimwood Mears, Knight, Chief Justice and Mr. Justice Sen.

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July, 15.

ASHIQ HUSAIN AND OTHERS (DEFENDANTS) *v.* CHATAR-BHUJ AND ANOTHER (PLAINTIFFS) AND AHMAD-ULLAH KHAN AND OTHERS (DEFENDANTS).*

Mortgage—Suit for sale—Limitation—"Notice"—Act No. IX of 1908 (*Indian Limitation Act*), *schedule* 1, *article* 132.

A simple mortgage, executed on the 1st of May, 1909, for a term of three years, contained a stipulation to the effect that, if the mortgagor transferred the mortgaged property, the mortgagee would be at liberty to sue before the expiry of the term. On the 8th of March, 1911, the mortgagor stood surety for one Ali Raza in the amount of Rs. 50, and hypothecated a small share in the property covered by the deed of 1909. No actual notice of this transaction was given to the first mortgagee. A suit was filed on the mortgage of 1909 on the 27th of March, 1924, and the plea of limitation was set up by the defendants.

Held that the suit was within time. No actual notice of the hypothecation of 1911 had been given to the plaintiff mortgagee, and in the circumstances there was no legal duty cast on the mortgagee of 1909 to keep on searching the registers for further dealings of the mortgagor with the property comprised in his mortgage.

Shib Dayal v. *Meharban* (1) and *Pancham* v. *Ansar Husain* (2), followed. *Nathi* v. *Tursi* (3), *Mata Tahal* v. *Bhagwan Singh* (4) and *Gaya Din* v. *Jhumman Lal* (5), referred to.

Meaning of "notice," actual or constructive, discussed. *Barnhart* v. *Greenshields* (6), *Hewitt* v. *Loosemore* (7), *Janki Prasad* v. *Kishen Dat* (8) and *Tilakdhari Lal* v. *Khedan Lal* (9), referred to.

*First Appeal No. 461 of 1924, from a decree of Ghanshyam Das, Additional Subordinate Judge of Aligarh, dated the 26th of August, 1924.

(1) (1922) I.L.R., 45 All., 27.
(2) (1921) I.L.R., 43 All., 596.
(3) (1921) I.L.R., 43 All., 671.
(4) (1921) 19 A.L.J., 406.
(5) (1915) I.L.R., 37 All., 400.
(6) (1853) 9 Moo., P.C., 18.
(7) (1851) 9 Hare, 449.
(8) (1894) I.L.R., 16 All., 478.
(9) (1920) I.L.R., 48 Calc., 1.

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THE facts of this case are fully stated in the judgement of the Court.

Maulvi *Muhammad Abdul Aziz*, for the appellants.

Babu *Piari Lal Banerji* and Munshi *Benode Behari Lal*, for the respondents.

MEARS, C. J. and SEN, J. :—The action was directed by the respondents, Chaturbhuj and Girdhari Lal, against three sets of defendants under the following circumstances :—

On the 1st of May, 1909, Syed Nazar Husain (now dead), father of the defendants 1—5, executed a simple mortgage in favour of the plaintiffs respondents for Rs. 3,000 with interest at 12 annas per cent. per mensem with half yearly rests. The property mortgaged consisted of a twenty biswa zamindari share in Qasba Amanpur, mahal non-applicants for partition, khewat No. 1, and a two and a half biswa share in mahal Nawazish Ali, khewat No. 3, patti Ram Lal. By a clerical error, the second item of property was described in the mortgage-bond as a $2\frac{1}{2}$ biswa share in mahal Nawazish Ali entered in khewat No. 2, patti Ram Lal.

The document was registered in the office of the Sub-Registrar of tahsil Kasganj, district Etah, on the 3rd of May, 1909.

The mortgagor having died without discharging his liability in whole or in part, the mortgagees brought the present suit against his heirs, the defendants 1—5, for recovery of Rs. 11,154-4.

The defendants 6—12 are the subsequent transferees of portions of the mortgaged property.

The defendants set up various defences which gave rise to no less than ten issues. At a late stage of the suit, the plaintiffs withdrew their claim against defendant No. 12, and the trial proceeded against the remaining

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defendants and eventually a decree was passed in plaintiffs' favour.

The defendants 6—11 have submitted to the decree of the court below. The defendants 1—5, who are the sons of the original mortgagor, have come up in appeal, and it is contended on their behalf that the plaintiffs' claim was time-barred. The other pleas taken in the memorandum of appeal were abandoned.

In order to be able to appreciate the plea of limitation raised by these defendants, it is necessary to examine their written statement with care. In the additional pleas, they say :—

"The plaintiffs' suit is barred by time. The plaintiffs' allegation that the cause of action accrued on the 1st of May, 1912, is totally wrong. The cause of action accrued to the plaintiffs long before that date, and the suit has been instituted long after the accrual of the cause of action."

The terms in which the plea of limitation has been couched are thus as vague as can be, and the court should at once have required the pleader to set out with particularity the circumstances upon which he relied in support of the plea of limitation.

It was not until a late stage of the trial, possibly during the course of argument before the lower court, that the plea of limitation materialized into a more distinct form. The mortgage in suit is dated the 1st of May, 1909. It was payable in three years and the plaintiffs could sue for recovery of the mortgage money within 12 years from the 30th of April, 1912. The suit was launched on the 27th of March, 1924, and was, therefore, within time on that date. The mortgage bond, while providing that the money was payable on the 30th of April, 1912, contained a further stipulation in these terms :

"If I make transfer, etc., of the hypothecated property or if any one gets the same advertised for sale, the creditors shall,

even before the expiry of the term, be at liberty to institute a suit for recovery of the amount of this bond with the entire interest and compound interest for the aforesaid period of 3 years."

On the 8th of March, 1911, Syed Nazar Husain, the mortgagor, stood surety for one Munshi Ali Raza and executed a surety bond in favour of the Secretary of State in Council for a paltry sum of Rs. 50, and hypothecated a one biswa share in mauza Amanpur, mahal Nawazish Ali, entered in khewat as holding No. 3. It is contended before us that Nazar Husain, in breach of his covenant not to transfer the hypothecated property, had, by executing the mortgage bond in favour of the Secretary of State on the 8th of March, 1911, accelerated the cause of action in plaintiffs' favour and the plaintiffs were, therefore, under article 132 of the Indian Limitation Act bound to institute their suit within 12 years from the 8th of March, 1911. The last date of limitation expired on the 8th of March, 1923, and if this contention is right, the suit was time-barred on the 27th of March, 1924.

We have already pointed out above that there was a misdescription in the mortgage bond in suit as regards the second item of the secured property. The defendants appellants in paragraph 3 of the additional pleas contended that the plaintiffs had no power to get any property other than the hypothecated property sold in auction. It was strenuously contended in the trial court that the property mortgaged to the plaintiffs was situate in khewat No. 2 and not in khewat No. 3 and the plaintiffs, therefore, could not enforce their mortgage against the property situate in khewat No. 3. This plea was repelled by the court below and the learned counsel for the appellants has very properly abandoned this plea at the time of argument. The fact however remains that paragraph 3 of the additional pleas was not reconcilable

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with the facts on which the defendants' plea of limitation is founded.

We have been referred to a number of authorities in support of the plea of limitation. In *Pancham* v. *Ansar Husain* (1), two persons borrowed Rs. 5,000 under a mortgage bond on the 21st of February, 1893, and agreed to repay the loan in 12 years. They further stipulated that they would pay annually a sum of Rs. 500 on account of interest, but if in any year they were unable to pay the interest, the interest might be treated as principal. The bond further provided that if there was any default in payment of Rs. 500 per annum, the mortgagee was to have power without waiting for the expiry of the stipulated period to set aside all other stipulations embodied in the document and at once to bring a suit to enforce the mortgage security. It was held by the court that time began to run from the first default in payment of the annual sum of Rs. 500. A similar view was taken in *Nathi* v. *Tursi* (2).

There has been in the past a divergence of judicial opinion on this point both in this Court and the other Indian High Courts. As an illustration of the opposite view we have been referred to *Mata Tahal* v. *Bhagwan Singh* (3), *Girdhari Lal* v. *Gobind Ram* (4), and the view of the minority in *Gaya Din* v. *Jhumman Lal* (5). On the other side of the line are cases like *Ram Das* v. *Muhammad Said Khan* (6). In this case it was held that when there was a covenant to pay the principal sum in 3 years and interest year by year, but the mortgagee was authorized to realize the whole amount of his principal and interest in case of default of the payment of the annual interest, the cause of action for the suit matured in default of payment of interest in the first year. So far

(1) (1921) I.L.R., 43 All., 596.
(2) (1921) I.L.R., 43 All., 671.
(3) (1921) 19 A.L.J., 406.
(4) (1921) 19 A.L.J., 456.
(5) (1915) I.L.R., 37 All., 400.
(6) (1922) 20 A.L.J., 346.

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as this Court is concerned, the conflict of decisions was set at rest by the pronouncement in *Shib Dayal* v. *Meharban* (1), but we are not prepared to extend the principle beyond the limits of decided cases, more especially in view of the warning note sounded by the Privy Council in *Pancham* v. *Ansar Husain* (2).

The noticeable feature in the latter group of cases is that there being default either in the payment of the instalments or in the payment of interest at stated periods, the matter was peculiarly within the knowledge of the mortgagee. He knew that the default had taken place on the part of the mortgagor. He knew that under a distinct stipulation contained in the mortgage bond his money had " become due " and he was bound to sue for his money from the date of the default.

In the present case, however, time is said to begin to run, not by the happening of an event which was peculiarly or at all within the knowledge of the mortgagee, but by reason of the mortgagor executing a hypothecation bond of a small portion of the second item of property. In the normal course of events, the mortgagees could not be expected to know anything about this transaction. The defendants do not allege in their written statement that the mortgagees came to know of this document any time before the institution of the present suit, or how or when they came to know of it. They have led no evidence whatsoever on the point and the learned counsel for the appellants has taken shelter under the plea that the mortgage dated the 8th of March, 1911, was effected by means of a registered instrument and should therefore be held to be constructive notice. It is not pretended that the mortgagees had at any time actual notice of the mortgage dated the 8th of March, 1911. " An actual notice, to constitute a binding notice, must be definite information given by a person interested in the thing in respect of

(1) (1922) I.L.R., 45 All., 27. (2) (1921) I.L.R., 43 All., 596.

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which the notice is issued; for it is a settled rule that a person is not bound to attend to vague rumours or statements by mere strangers, and that a notice to be binding must proceed from some persons interested in the thing '' : *Barnhart* v. *Greenshields* (1). It was held in the case of *Hewitt* v. *Loosemore* (2) that constructive notice is knowledge which the court imputes to a person, from the circumstances of the case, upon a legal presumption so strong that it cannot be allowed to be rebutted, that the knowledge must exist though it may not have been formally communicated. Different High Courts have held different views as to whether registration amounts to notice. Our own Court, while answering the question affirmatively, does not lay down any inflexible rule. In *Janki Prasad* v. *Kishen Dat* (3) it has been observed as follows :—

" We do not decide that registration is of itself notice to all the world. All we do decide is, where it is the duty of a person to search, or where a reasonable prudent man would in his own interest make a search, then the fact that the search if made would have disclosed a document affecting the property, affects that man with notice of such a document and puts on him the necessity of further enquiry."

The Judicial Committee in *Tilakdhari Lal* v. *Khedan Lal* (4) has also made a similar pronouncement.

We have no doubt that no legal duty was cast upon the mortgagees on grounds of public policy or on considerations of prudence or business to make a search of the registry. We have no doubt that the transaction dated the 8th of March, 1911, was not in any shape or form brought home to the plaintiffs respondents. We hold, therefore, that the cause of action was not accelerated and the suit is within time.

We dismiss the appeal with costs.

Appeal dismissed.

(1) (1853) 9 Moo., P.C., 18.
(2) (1851) 9 Hare, 449.
(3) (1894) I.L.R., 16 All., 478.
(4) (1920) I.L.R., 48 Calc., 1.

REVISIONAL CIVIL.

Before Mr. Justice Boys and Mr. Justice Kendall.

CHATARBHUJ (APPLICANT) *v.* HARNAND LAL (OPPOSITE PARTY).*

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July, 19.

Civil Procedure Code, sections 115 *and* 151; *order XXXII, rule* 15—*Act No. IV of* 1912 (*Indian Lunacy Act*), *section* 62—*Lunacy—Distinction between inquiry under the Lunacy Act and under the Civil Procedure Code—Inherent powers of High Court.*

The matter for determination under section 62 of Act No. IV of 1912 is not the same as the matter for determination in an application under order XXXII, rule 15, of the Code of Civil Procedure. A court, therefore, ought not to refuse to consider an application made to it under order XXXII, rule 15, for the sole reason that another court, of superior jurisdiction, has arrived at a certain decision in a matter under Act No. IV of 1912; and if it does so, this refusal is liable to be called in question under section 151 of the Code of Civil Procedure. *Harnand Lal* v. *Chaturbhuj* (1), referred to.

THE facts of this case sufficiently appear from the judgement of the Court.

Dr. *N. C. Vaish*, for the applicant.

Dr. *Kailash Nath Katju* and Mr. *B. Malik*, for the opposite party.

BOYS and KENDALL, JJ. :—The dispute in connection with which this civil revision arises has already been before this Court and the matter then in dispute was the subject of Civil Revision No. 125 of 1925, decided on the 19th of June, 1926, and reported in *Harnand Lal* v. *Chaturbhuj* (1). The trouble arises out of a contract for sale of a house entered into on the 8th of September, 1923, by which Chatarbhuj, son of Mewa Ram (not the Chatarbhuj, son of Hem Raj, who is the applicant before

*Civil Revision No. 94 of 1927.
(1) (1926) I.L.R., 48 All., 356.

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us), agreed to purchase from Harnand Lal, the opposite party in this application, the house in question for Rs. 95,000. He failed to carry out the contract after having paid Rs. 15,000, and Harnand Lal brought a suit against him in the court of the Subordinate Judge. On the 2nd of May, 1925, Chatarbhuj, son of Hem Raj, applied under order XXXII, rule 15, to be made guardian of the defendant Chatarbhuj, son of Mewa Ram. In August, 1925, Chatarbhuj, son of Hem Raj, started lunacy proceedings under Act No. IV of 1912 in the court of the District Judge, asking that Chatarbhuj, son of Mewa Ram, might be declared to be not of sufficiently sound mind to be able to manage his property and his affairs. To this proceeding he did not make Harnand a party. The next step was a request by Chatarbhuj, son of Hem Raj, to the Subordinate Judge to stay proceedings in his court on the ground of the pendency of the lunacy proceedings in the court of the District Judge. The learned Subordinate Judge refused to stay the proceedings on the ground that if the lunacy proceedings ended in the dismissal of the application, he, the Subordinate Judge, would have to proceed with his inquiry under order XXXII, rule 15. Plaintiff applied to the High Court in revision of this order refusing to stay, and the High Court stayed proceedings by the judgement to which we have already referred, reported as *Harnand Lal* v. *Chaturbhuj* (1).

The lunacy proceedings continued in the court of the District Judge—Harnand having been made a party at his own request. The learned District Judge dismissed the application, and Chatarbhuj, son of Hem Raj, appealed to this Court with no success. The judgement of their Lordships, Mr. Justice WALSH and Mr. Justice BANERJI, is very brief and guarded, clearly, as it appears to us, with the intention of not prejudicing the decision

(1) (1926) I.L.R., 48 All., 356.

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at which the Subordinate Judge would later have to arrive under order XXXII, rule 15. The matter then had reached the stage at which the lunacy proceedings in the court of the District Judge had finally terminated by an order of dismissal, which had been upheld by this Court, and it remained for the Subordinate Judge to decide the matter under order XXXII, rule 15, between Chatarbhuj, son of Hem Raj, and Harnand. Both of these persons made applications to the Subordinate Judge : the one that he should hold an inquiry to determine under order XXXII, rule 15, the question whether Chatarbhuj, son of Mewa Ram, the defendant in the suit, was a person adjudged to be of unsound mind, or a person who, though not so adjudged, was by reason of unsoundness of mind or mental infirmity incapable of protecting his interests in the suit; the other, Harnand, asking for the application of Chatarbhuj, son of Hem Raj, to be struck off as Chatarbhuj, son of Mewa Ram, had been found not to be a lunatic.

On the 6th of April, 1927, the learned Subordinate Judge dismissed the application. He did not hold any independent inquiry whatsoever, but relied solely on the judgement of the District Judge in the lunacy proceedings as being a judgement between the parties to the application which he was deciding, and on the ground that " that court indirectly finally decreed that the defendant was not of such an unsound mind as to be incapable of protecting his interests ".

Chatarbhuj, son of Hem Raj, has brought the matter before this Court, asking it to exercise its powers under section 151 of the Code of Civil Procedure. We were not asked by the applicant to exercise powers under section 115 of the Code of Civil Procedure. No argument was addressed to us by either side as to that section. Counsel for the respondent proposed to argue that the application was not one which came properly within section 115 of

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the Code of Civil Procedure, but as the applicant had not contended that he had any right to apply under section 115, we stopped counsel for the respondent and only asked him to address us in reference to section 151. On subsequent consideration of the case, there is an aspect of it which suggests that it is by no means certain that the application would not lie under section 115. The contention that section 115 is not applicable was of course based on the view that the " case " had not been decided. But it is by no means certain that this is a correct view. One " case " that was before the Subordinate Judge was the suit between Harnand and Chatarbhuj, son of Mewa Ram. The application of Chatarbhuj, son of Hem Raj, against Harnand might at least arguably be regarded as a matter quite distinct in itself and separate from the main suit. To that application Chatarbhuj, son of Mewa Ram, does not even appear to have been made a party. As, however, this aspect of the case was not argued before us but only that concerning section 151, we are content to decide it on the basis of the applicability of that section.

To consider first the question of whether the order of the learned Subordinate Judge was or was not a proper order in that he dismissed the application relying solely upon the order of the District Judge in the lunacy proceedings and without making any inquiry himself.

In our view it was clearly not a proper order and he did not exercise the jurisdiction which was vested in him. The matter for determination before the learned District Judge was one within section 62 of Act IV of 1912. He had to determine whether Chatarbhuj, son of Mewa Ram, was a person " of unsound mind and incapable of managing himself and his affairs ". Under order XXXII, rule 15, the learned Subordinate Judge had to determine whether Chatarbhuj, son of Mewa Ram, not being a person already adjudged to be of unsound mind, was " by

reason of unsoundness of mind *or mental infirmity* incapable of protecting his interests in the suit ''.

Had the two issues to be determined by the respective courts been identical, there can be no question but that the learned Subordinate Judge would have been justified in holding himself bound by the finding of the District Judge which had been arrived at *inter partes*. But the language of the two provisions is not the same and we are not prepared to hold that a finding by the learned District Judge that Chatarbhuj, son of Mewa Ram, was not a person of unsound mind and incapable of managing his affairs necessarily precluded a finding by the learned Subordinate Judge that by reason of '' mental infirmity he was incapable of protecting his interests in the suit ''. We think, therefore, that it was incumbent upon the learned Subordinate Judge to come to a finding upon his own independent judgement after independent inquiry as to whether order XXXII, rule 15, required the appointment of a guardian, and he was not entitled to adopt the finding of the learned District Judge as conclusive on the point, and this view was clearly taken by the Subordinate Judge or his predecessor when he, at an early stage of the proceedings, refused to stay his inquiry for the reason we have quoted above. We must not be taken to suggest anything whatever in regard to the merits. It was and is for the Subordinate Judge alone at this stage to determine that question. It is for this reason that we do not discuss or lay emphasis in any way upon any of the phrases in the judgement of the learned District Judge, pointing in one direction or the other, on which stress has been laid before us in argument. We content ourselves, therefore, with noting that his only *finding* was that '' there is certainly not sufficient material on the record to justify taking action under the Lunacy Act ''.

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It was contended naturally for the opposite party that this Court has no power to interfere in exercise of the inherent powers vested in it and saved to it by section 151 of the Code of Civil Procedure in a matter in which no " case " had been decided. It was contended that we had no power to go beyond the provisions of section 115 of the Code of Civil Procedure. This is a contention which in our view is, on the face of section 151 itself, untenable. It is clear that the section itself assumed that the court has some inherent powers to make such orders as may be necessary for the ends of justice or to prevent an abuse of the process of the court and nothing in the Code of Civil Procedure is to be deemed to limit or otherwise affect those powers. The further argument, of course, was addressed to us that if we interfere in the exercise of our inherent powers in a case like this, there is no limit to the number of cases in which we might similarly be asked to interfere. It is not an argument which carries any weight with us. There is nothing whatever to stop any applicant making any frivolous application when he pleases, short of being guilty of contempt of court. It is for this Court to deal with such applications and, in the great majority of them, where frivolous, the applicant will be penalized by having to pay the costs. In any case that is not an argument which can carry any weight to restrain this Court from interfering in a proper case.

Again it is of course urged " what was the use of the legislature laying down conditions in section 115 to govern interference in revision if the court can interfere under some other power vested in it, uncontrolled by at least one of the conditions laid down in section 115?" This might be countered by a similar question " what is the use of the legislature by section 151 saving the court's inherent powers from being affected by the Code if those powers are never to be exercised?" But there is also a

direct answer. The powers under section 115 are the restricted powers normally to be exercised, but the legislature itself recognized that it was not possible to foresee and make provision for all cases that might arise and expressly thought fit to reserve the inherent powers unaffected by the Code to meet such cases. This obviously suggests that such powers should be exercised with restraint and caution, but equally obviously suggests that they were intended to be exercised in suitable cases.

In the present case there is a strong consideration inclining us to exercise our powers. We have the dismissal of the application asking for an inquiry under order XXXII, rule 15, without any inquiry at all made by the court such as is required by law. This is in effect "an abuse of the process of the court". It was contended before us that if a court decided a question of limitation against one of the parties, our decision to interfere in a case like this would open the door to the party adversely affected to come to this Court and urge that he could establish the other view and ask this Court to exercise its inherent powers. That is a wholly different case. In such a case the court would have committed no abuse of process but would have merely exercised its judicial discretion wrongly. We think, therefore, that this is a case in which we should interfere.

Setting aside, therefore, the order of the learned Subordinate Judge dismissing the application, we direct him to re-admit the application for hearing and to decide it in accordance with the law. The case will be taken up by the learned Subordinate Judge from the stage at which it had arrived immediately prior to his delivering the order dismissing the application. If the parties are able to arrive at an agreement as to reading in this matter the evidence taken before the learned District Judge, with any further cross-examination or evidence which may be

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necessary, it may be a wise course and may expedite the settlement of the matter and permit of a speedy hearing of the suit.

Order set aside.

APPELLATE CIVIL.

Before Mr. Justice Ashworth and Mr. Justice Kendall.

1927
July, 22.

KOKA AND ANOTHER (DEFENDANTS) *v.* CHUNNI (PLAINTIFF).*

Act (Local) No. II of 1901 *(Agra Tenancy Act), section* 165*—Lambardar and co-sharer—Suit by lambardar against co-sharer for profits of* sir *or* khudkasht *in excess of his share.*

A lambardar cannot sue as lambardar one or more co-sharers for any sum due from them by reason of their holding as *sir* or *khudkasht* excess land. *Bishambhar Nath* v. *Bhullo* (1), followed. *Ganga Singh* v. *Ram Sarup* (2), dissented from. *Kundan Lal* v. *Basant Rai* (3), referred to.

A suit under section 165 of the Tenancy Act must be one for accounts primarily and it must be shown by figures that the other co-sharers have no claim to the excess which the particular co-sharer, who is plaintiff, is claiming. The fact that the plaintiff may have paid off another co-sharer out of his own pocket will not give the plaintiff a right to recover the money so paid from a third co-sharer.

THE facts of this case sufficiently appear from the judgement of the Court.

Munshi *Narain Prasad Asthana,* for the appellants.

Dr. *N. C. Vaish,* for the respondent.

ASHWORTH and KENDALL, JJ. :—This second appeal which came up before a single Judge of this Court has been referred to a Bench of two Judges on account of

*Second Appeal No. 464 of 1925, from a decree of A. G. P. Pullan, District Judge of Agra, dated the 26th of November, 1924, confirming a decree of Mahesh Bal Dikshit, Assistant Collector, first class of Agra, dated the 24th of March, 1924.

(1) (1911) I.L.R., 34 All., 98. (2) (1916) I.L.R., 38 All., 223.
(3) (1923) 75 Indian Cases, 330.

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the apparent conflict between the case of *Bishambhar Nath* v. *Bhullo* (1), on the one side, and *Ganga Singh* v. *Ram Sarup* (2) and *Kundan Lal* v. *Basant Rai* (3), on the other hand. The whole question involved is whether a lambardar can sue as lambardar any co-sharer who has occupied land bringing in an estimated yearly income in excess of the sum due to that co-sharer according to his fractional interest in the mahal.

An attempt has been made by the plaintiff lambardar's counsel in this second appeal to show that the suit was not one of this description, and, secondly, that it was not treated by the lower courts as one of this description. The former attempt must fail in view of the account filed by the plaintiff with his plaint. That account does not show the plaintiff's share in the mahal as a co-sharer. It claims from the defendants the whole of the excess in value of their *khudkasht* and *sir* land over the amount due to the defendants by reason of their fractional share in the mahal. It also credits the plaintiff with *lambardari haq*. It is, therefore, quite clear that the plaintiff is suing as a lambardar.

The trial court, of which the decision has been upheld by the lower appellate court, does appear to have treated the suit as one by the lambardar in his capacity as a co-sharer. The trial court has ascertained the plaintiff's individual share and worked out what sum was due to him as an individual co-sharer. This involves a change in the nature of the suit from that actually brought. We might have been disposed to permit of such a change being made and uphold the decree of the lower courts, if it were not open to objection on another ground than that the plaintiff's case had been changed in the course of hearing. But the lower courts have, in our opinion, erred in one material point. They have allowed the plaintiff to claim the whole of the excess

(1) (1911) I.L.R., 34 All., 98. (2) (1916) I.L.R., 38 All., 223.
(3) (1923) 75 Indian Cases, 330.

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income in the hands of the two defendants, because the plaintiff's share in the total profits of the mahal does not exceed (except by a few rupees) that excess. One co-sharer is not entitled to claim the whole of the excess in the hands of another co-sharer merely because he is short to that extent of his fractional share in the income of the mahal. All the other co-sharers who are similarly short are entitled to share in the excess income enjoyed by any one co-sharer and they must be made parties to the suit by the one co-sharer. This fact was ignored by the trial court. It was perceived by the lower appellate court which attempted to meet it in the following way. The District Judge has stated that four of the other co-sharers admitted as witnesses (not as parties) that there was nothing due to them and later on he states that the plaintiff's case is that he has paid off the other co-sharers what was due to them. This will not, however, satisfy the requirements of section 165 of the Tenancy Act. A suit under section 165 must be one for accounts primarily. It is necessary that there should be accounts showing that the plaintiff is entitled to the sum claimed. For this purpose it must be shown by figures that the other co-sharers have no claim to the excess which the particular co-sharer, who is plaintiff, is claiming. The fact that the plaintiff may have paid off another co-sharer out of his own pocket will not give the plaintiff a right to recover the money so paid from a third co-sharer under section 165. Section 165 is confined to a claim for a share of money collected in excess which is due to the plaintiff on the ground of its being so collected. One co-sharer cannot claim on behalf of another co-sharer merely by reason of making a payment to that other co-sharer, without some transfer of the actionable claim which would be valid in law. No such transfer is set up in this case. So far, then, as the decree appealed against may be regarded as a decree in favour of an individual co-sharer, it may be impugned on the ground that the plaintiff respondent

was not shown by the accounts prepared by the trial court to be entitled to the sums decreed him, inasmuch as the claims of the other co-sharers were not included in that account. We are unable, therefore, to uphold the decree of the lower courts.

We now come to the question raised by the Judge of this Court who had this case referred to a Bench. The plaintiff sued as lambardar. Should his suit have been entertained as such? In the case of *Bishambhar Nath* v. *Bhullo* (1) it was held by a Bench of two Judges of this Court that a lambardar is not the agent of the co-sharers generally, so as to be entitled to sue on their behalf to recover profits due to some of them from other co-sharers holding *sir* and *khudkasht* lands in excess of their proper shares. The basis of this decision was that there might be a custom or rule conferring on the lambardar a power to represent all the co-sharers against a non-co-sharer, but that there could not be (or at any rate was not) any custom or rule of law entitling a lambardar to represent some of the co-sharers against others. In *Ganga Singh* v. *Ram Sarup* (2) there was a suit by certain co-sharers against a lambardar for profits. The plaintiffs claimed in that suit that the lambardar should be responsible to them for excess income enjoyed by other co-sharers by reason of the value of their *sir* and *khudkasht* exceeding their fractional share of profits. The court permitted this to be done, although it was argued that a lambardar could not be made liable for such excess profits, if, as ruled in *Bishambhar Nath* v. *Bhullo*, he was not entitled to realize them by a suit. This contention was rejected mainly on the consideration that a lambardar must be entitled to reply to co-sharers claiming their shares of rental collected that these co-sharers had realized all that to which they were entitled by possession of *sir* and *khudkasht*. This consideration was

(1) (1911) I.L.R., 34 All., 98. (2) (1916) I.L.R., 38 All., 223.

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held to establish in suits under section 165 of the Tenancy Act the necessity of taking into consideration the amount of *sir* and *khudkasht* owned by the parties. Incidentally in this decision it was remarked that " if the lambardar is the agent of the co-sharers to bring a suit for rent, he seems to be equally their agent for the purpose of bringing a suit against co-sharers who hold *sir* and *khudkasht* in excess and who have refused to allow the *sir* and *khudkasht* which they hold to be taken into account ".

This latter passage was quoted with approval by a single Judge in the case of *Kundan Lal* v. *Basant Rai* (1) in which case the lambardar was held to have a right to sue on behalf of certain co-sharers against other co-sharers holding land in excess of their shares. It is not clear from the recorded judgement in the case of *Ganga Singh* v. *Ram Sarup* (2) whether the plaintiffs were asking the lambardar to account for an excess which had been realized by the lambardar or not. If this excess was one not yet realized by the lambardar but which it was claimed he could realize, then it is true that the decision in *Ganga Singh* v. *Ram Sarup* (2) could not be reconciled with the decision in *Bishambhar Nath* v. *Bhullo* (3), otherwise there would be no inconsistency between the two decisions. Again the illustration given in *Ganga Singh* v. *Ram Sarup* (2), which led to the decision of the court that it was necessary to take *sir* and *khudkasht* into consideration, does not appear to us necessarily to have that effect. If a co-sharer sues a lambardar for his share of rental, that co-sharer must be deemed to have actually collected in excess the value of his *khudkasht* so far as that value exceeds his fractional share of the income of the mahal. There is no difficulty in making a co-sharer, whether plaintiff or defendant, liable for payment of what he has actually collected or must be deemed to have col-

(1) (1923) 75 Indian Cases, 330. (2) (1916) I.L.R., 38 All., 223.
(3) (1911) I.L.R., 34 All., 98.

lected. It is quite another matter to require a lambardar to be responsible to co-sharers for excess due by other co-sharers which he has not collected. As regards a lambardar being the agent for certain co-sharers against other co-sharers, there is certainly nothing in the definition of " lambardar " in the Revenue Act as applied to the Tenancy Act by section 4 (13) and read with section 49 of the Revenue Act and the Board Rules, which would authorize a lambardar to represent a few only of the co-sharers against other co-sharers. Again, the collection of rent is governed by entirely different considerations to the collection of excess income from one co-sharer holding land yielding an annual income in excess of his share of the income of the whole mahal. A tenant is a party outside the co-sharers; and the lambardar, when suing the tenant, will represent all the co-sharers. A co-sharer holding *sir* or *khudkasht* cannot be regarded as holding it in a capacity other than that of a co-sharer. He holds the land because he is a co-sharer and it is impossible to set up the co-sharing body as a juristic body with interests entirely separate from the single co-sharer's interest.

We, therefore, in accordance with the decision in *Bishambhar Nath* v. *Bhullo* (1), in preference to that in *Ganga Singh* v. *Ram Sarup* (2), which decision we consider should not be followed so far as it dissents from the previous decision, hold that a lambardar cannot sue as lambardar one or more co-sharers for any sum due from them by reason of their holding as *sir* or *khudkasht* excess land.

We have remarked above that the lower courts allowed the plaintiff's case to be varied in the course of hearing, but their decision was open to objection even on the basis of the substituted case for the reasons stated.

(1) (1911) I.L.R., 34 All., 98. (2) (1916) I.L.R., 38 All., 223.

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For the above reasons we allow this appeal and dismiss the suit of the plaintiff with costs throughout.

Appeal allowed.

Before Mr. Justice Sulaiman and Mr. Justice Iqbal Ahmad.

1927 *July*, 26.

ABDUL KHAN (DEFENDANT) *v.* SHAKIRA BIBI (PLAINTIFF).*

Act (Local) No. XI of 1922 *(Agra Pre-emption Act), sections* 4 (3) *and* 16*—Pre-emption—Claim based on the Act and partly on the Muhammadan law—Effect of failure of one ground—"Land".*

The property which was the subject of a suit for pre-emption consisted of a zamindari share and also a one-third share in a house and a sugarcane pressing mill. The plaintiff sued to pre-empt the zamindari under the provisions of the Agra Pre-emption Act, 1922, and the share in the house and the mill on the basis of the Muhammadan law. She failed in her claim under the Muhammadan law because the necessary demands had not been properly made.

Held, that the whole claim should be dismissed, section 16 of the Agra Pre-emption Act not having made any change in the law in this respect.

Muhammad Wilayat Ali Khan v. *Abdul Rab* (1), *Mujib-ullah* v. *Umed Bibi* (2), *Abdul Rahman* v. *Hedayat-ullah* (3) and *Puech* v. *Aziz Fatima Bibi* (4), followed.

Aliter, if the claim for pre-emption of the house and the sugarcane pressing mill was based on the plaintiff's right to pre-empt these properties under the Act as being attached to the land upon which they stood, and if the whole of such land was included in the sale.

THE facts of this case sufficiently appear from the judgement of the Court.

Maulvi *Mukhtar Ahmad*, for the appellant.

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*Second Appeal No. 1159 of 1926, from a decree of Priya Charan Agarwal, Subordinate Judge of Azamgarh, dated the 25th of March, 1926, confirming a decree of Bijaypal Singh, City Munsif of Azamgarh, dated the 2nd of December, 1925.

(1) (1888) I.L.R., 11 All., 108. (2) (1898) I.L.R., 21 All., 119.
(3) (1913) 12 A.L.J., 88. (4) (1920) 19 A.L.J., 107.

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Munshi *Sheo Dihal Sinha*, for the respondent.

SULAIMAN and IQBAL AHMAD, JJ. :—This is defendant's appeal arising out of a suit for pre-emption. The property sold by the vendor consisted of a zamindari share as well as a one-third share in a house and a sugar-cane pressing mill. The plaintiff sued to pre-empt the zamindari under the provisions of the Agra Pre-emption Act, and the share in the house and the mill on the basis of the Muhammadan law. On the date fixed for hearing her witnesses were not present, but an application unaccompanied by an affidavit was filed asking for an adjournment. That application was disallowed and the plaintiff's claim as regards the last two items was dismissed on the ground that she had not performed the necessary demands required by the Muhammadan law; but her claim for pre-emption of the zamindari was decreed on payment of a proportionate price. That judgement has been affirmed by the lower appellate court.

The contention before the courts below was that it was the duty of the plaintiff to pre-empt the entire property which was sold by the vendor, and that inasmuch as by not having performed the necessary demands she disqualified herself from pre-empting part of the property under the Muhammadan law, her claim based on the provisions of the Act must also fail on the ground of partial pre-emption.

The lower appellate court overruled this contention on the ground that an amendment proposed by a member in the Legislative Council for adding the words " in accordance with the provisions of this Act " at the end of section 16 was opposed because it was thought unnecessary and superfluous and was lost, and that therefore the expression " entitled to pre-empt " in that section must be deemed to mean " pre-empt under the Act ". It is not proper to refer to the proceedings of the Legislative

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Council in order to determine the true interpretation of the language of a section. We have to interpret the section as it stands, irrespective of what might have been thought by any individual member of the Legislative Council.

There can be no doubt that, prior to the passing of the Act, it was laid down by this Court that a pre-emptor must pre-empt the entire property sold, whether he has a right of pre-emption on the basis of a custom or the Muhammadan law. This view was first expressed in the case of *Muhammad Wilayat Ali Khan* v. *Abdul Rab* (1), where the plaintiff, having disqualified himself from pre-empting a portion of the property under the Muhammadan law, was not allowed to pre-empt the rest under the *wajib-ul-arz*. The learned Judges, at page 110, however, remarked that it was a question on which, although they had affirmed an opinion, they expressed that opinion with some hesitation. That view was consistently followed in a number of cases by this Court, and by some Judges perhaps reluctantly: *Mujib-ul-lah* v. *Umed Bibi* (2), *Abdul Rahman* v. *Hedayat-ul-lah* (3) and *Puech* v. *Aziz Fatima Bibi* (4).

Although from one point of view the rule of law was perfectly sound, namely, that a pre-emptor should not be allowed to pick and choose, there was also much to be said for the contrary view that the rights of pre-emption based on custom, contract or Muhammadan law are separate and distinct, and a pre-emptor might very well rely on one such right and not on all. Properties may be sold under one sale-deed, to some of which a person has right under a prevailing custom, to another portion under some special contract between the parties and to a third under the Muhammadan law provided he fulfils the necessary conditions. A pre-emptor might well abandon his right based on any special contract which might be

(1) (1888) I.L.R., 11 All., 108.
(2) (1898) I.L.R., 21 All., 119.
(3) (1913) 12 A.L.J., 88.
(4) (1920) 19 A.L.J., 107.

difficult to prove, or on the Muhammadan law, in which case also the oral demands may be difficult to prove, and may fall back exclusively on his right under the custom. In the case of a specific performance of a contract of pre-emption there may be special circumstances under which a court may refuse to exercise its discretion. In cases under the Muhammadan law the uncertainty of convincing a court as to the performance of the demands by producing oral evidence of mere relations or friends, might be felt to be very great. There is, therefore, a certain amount of hardship on a pre-emptor who has undoubtedly the right under the custom, if he is called upon to come to court on the basis of a contract as well as the Muhammadan law. In view, however, of the series of rulings of this Court, it is not possible for us to make a departure unless we are satisfied that the new Act has made an alteration.

The latter portion of section 16 of the Act lays down that no suit shall lie for enforcing a right of pre-emption in respect of a portion only of the property which the plaintiff is entitled to pre-empt. The courts below have thought that this section is exhaustive and embodies the whole law of partial pre-emption, and that the words "in accordance with the provisions of the Act" must be deemed to be understood at the end of the section. In our opinion this is not a sound inference. Even if we assume that the word " pre-empt " at the end of the section means " pre-empt under the Act ", the conclusion is not justified. The proviso to section 3 specifically lays down that where there is no right of pre-emption under section 5, the provisions of the Muhammadan law of pre-emption shall not be affected in case the vendor and the pre-emptor are both Muhammadans. It is thus obvious that where there is no right under section 5, the right under the Muhammadan law is maintained. An enforcement of a right of pre-emption under the Muham-

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madan law would therefore also be a pre-emption under the Act. In a case in which a zamindari and a house are sold together, the claim to pre-empt the zamindari would be under section 5 read with section 11 and the claim to pre-empt the house under the Muhammadan law would be in accordance with the provisions of section 3. Both claims would therefore be under the Act and section 16 would require that the plaintiff must pre-empt the whole of the property which he is entitled to pre-empt.

Another significant circumstance is the use of the word " property " instead of the word " land " in section 16. Had it been intended that a pre-emptor is bound to pre-empt only the landed property sold and need not include in his claim house properties, one would have expected to find the prohibition confined to landed property which the plaintiff is entitled to pre-empt, instead of the use of the more comprehensive word " property ".

Although we consider it unfortunate that the old rule which caused serious difficulties has not been altered, we are constrained to hold that the language of section 16 does not do away with the former interpretation of the law.

It is next contended that even if the claim under the Muhammadan law for pre-emption of the house and the sugarcane pressing mill fails, the plaintiff has a right to pre-empt these properties under the Act as the definition of land is wide enough to cover such properties. There is no doubt that under the old law houses and buildings, other than those which automatically pass with the zamindari, could not be pre-empted. Section 4 (3) of the Pre-emption Act, however, defines land as "(including things attached to the earth or permanently fastened to anything attached to the earth, when sold or foreclosed along with the land to which they are attached, but not otherwise ". The expression " attached to the earth " has been defined in section 3 of the Transfer of Property

Act and there it undoubtedly includes buildings. That definition, however, must be deemed to have been intended for the purposes of that Act only and cannot be imported into the Pre-emption Act. Nevertheless the use of the two expressions "attached to the earth" and "permanently fastened to anything attached to the earth" does indicate that it was intended that buildings which are built upon land should be included. The wide scope of the definition could not have been intended to apply to trees only. We must therefore hold that under the Act "land" includes buildings standing upon it.

But in order to be pre-emptible such buildings must be sold along with the land to which they are attached, but not otherwise. If, therefore, the sites occupied by the house and the sugarcane pressing mill were the exclusive property of the vendor and had been completely sold under the deed, there would be no difficulty in holding that they also are pre-emptible. This would have been the case also if the whole zamindari had been sold. But in the present case only a one anna and odd share in the zamindari has been transferred. If the sites are joint lands then only a corresponding share in those sites has been transferred. It would then be very difficult to hold that the sugarcane mill and the house have been sold along with the lands to which they are attached, inasmuch as they would be deemed to be attached to the sixteen annas shares in the lands, whereas only a one anna and odd share has been sold.

We accordingly send down the following issue to the lower appellate court for a finding :—

(1) Whether both or either of the sites occupied by the house and the sugarcane pressing mill were the exclusive property of the vendor or the joint property of the co-parcenary body.

As this aspect of the question was overlooked, we direct that the parties should have the opportunity of

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producing any further evidence on this issue which they may choose to do. The finding should be returned by the 31st of October, 1927, and the usual ten days will be allowed for objections.

Issue remitted.

FULL BENCH.

Before Mr. Justice Lindsay, Acting Chief Justice, Mr. Justice Iqbal Ahmad and Mr. Justice Sen.

1927 *July*, 26.

DAYA RAM (PLAINTIFF) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT).*

Act No. XII of 1884 *(Agriculturists Loans Act), section* 4—Taqavi *loan—Act (Local) No. III of* 1901 *(United Provinces Land Revenue Act), sections* 145, 183, 233(*m*)—*Alleged wrongful attachment of property to realize* taqavi—*Payment under protest followed by suit against Secretary of State.*

One RN having died owing a certain sum to Government as *taqavi*, the revenue authorities attached a she-buffalo in the possession of DR on the ground that the latter was the heir of RN and that the buffalo was the property of the deceased. DR objected to the attachment, but his objection was overruled. He thereupon paid under protest the amount of *taqavi* claimed, and got back the buffalo, but meanwhile its calf had died owing to its separation from the mother. He then sued the Secretary of State for India in Council for refund of the money paid, for damages for the death of the calf, and for the price of the milk of which he had been deprived owing to the alleged wrongful attachment.

Held, that section 183 of the United Provinces Land Revenue Act applied, and the applicant was competent to maintain a suit against the Secretary of State, but only for the recovery of the amount paid and not for damages.

*Civil Revision No. 98 of 1927.

Balwant Singh v. *The Secretary of State for India* (1), followed. *Tulsa Kunwar* v. *Jageshar Prasad* (2), *The Secretary of State for India in Council* v. *Mahadei* (3), *The Secretary of State for India in Council* v. *Sukhdeo* (4) and *Sahai* v. *Bindeshri Singh* (5), referred to.

THE facts are fully stated in the judgement of the Court.

Munshi *Girdhari Lal Agarwala*, for the applicant.

Pandit *Uma Shankar Bajpai*, for the opposite party.

LINDSAY, A. C. J., IQBAL AHMAD and SEN, JJ. :—The suit giving rise to the present application for revision was instituted by the applicant, Daya Ram, for recovery of Rs. 200 as compensation from the Secretary of State. The facts which led to the suit are these. A certain sum of money was advanced by the Government to two persons, Ram Nazar and Jagannath, under section 4 of the Agriculturists Loans Act (Act XII of 1884). This kind of loan is popularly known as a *taqavi* advance, and its character has been described in the Act as a loan granted to owners and occupiers of arable land for the relief of distress, the purchase of seed or cattle, or for any other purpose connected with agricultural objects.

The loan was not repaid either by Ram Nazar or Jagannath. Ram Nazar having died, the revenue authorities, in pursuance of the provision of section 5 of the Act, attached a she-buffalo in the possession of Daya Ram on the ground that the latter was the heir of Ram Nazar and the she-buffalo was the property of the deceased. Daya Ram objected to the attachment on the ground that he was not the heir of Ram Nazar, and that the she-buffalo belonged to him; but his petition of objections was summarily dismissed by the Collector. Thereupon Daya Ram paid under protest in writing duly signed by him Rs. 76-12-11 being the amount of the *taqavi* demand and Rs. 4 the fees for attachment, in all

(1) (1903) I.L.R., 25 All., 527. (2) (1906) I.L.R., 28 All., 563.
(3) (1896) I.L.R., 19 All., 127. (4) Weekly Notes, 1898, p. 173
(5) Weekly Notes, 1905, p. 237.

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Rs. 80-12-11 and procured the release of the she-buffalo. During the intervening period, i.e., between the date of the attachment and removal of the buffalo from the possession of Daya Ram and the date of its release, the calf of the buffalo died in consequence of its separation from its mother. Then the present action was commenced for a refund of Rs. 80-12-11 with interest and for recovery of damages caused by the death of the buffalo calf and for the price of the milk of which the plaintiff was deprived on account of the unlawful attachment of the she-buffalo. Rupees 200 were claimed in all.

The suit was resisted on the ground that Daya Ram was the heir of Ram Nazar and in possession of his estate; that the buffalo was rightly attached, and that the suit was barred by section 233 (*m*) of the Land Revenue Act (Act III of 1901).

The trial court decreed the suit. It found that the plaintiff was not the heir of Ram Nazar, and that the suit was not barred by section 233 (*m*) of the Land Revenue Act which applied to persons "who were connected with the payment of revenue or *taqavi* due from them and could not affect the rights of third persons" like the plaintiff, "who had nothing to do with the *taqavi* loan . . . and was in no way responsible for its payment".

The defendant appealed. The lower appellate court, in concurrence with the trial court, found that the plaintiff was not the heir of Ram Nazar, that the attachment of his she-buffalo was undoubtedly illegal, and that the plaintiff had suffered damages from deprivation of milk and the death of the buffalo calf. It held, however, on the authority of *The Secretary of State for India in Council* v. *Mahadei* (1), that the suit was not cognizable by the civil court, and it further held, on the authority of *The Secretary of State for India in Council* v. *Sukhdeo* (2), that the Naib-Tahsildar having attached

(1) (1896) I.L.R., 19 All., 127. (2) Weekly Notes, 1898, p. 173.

the she-buffalo, acting under the provisions of section 145 of the Land Revenue Act, no legal liability attached to the Government for the act of the Naib-Tahsildar. It accordingly allowed the appeal, and dismissed the plaintiff's suit.

It may be noticed here that neither of the two courts below applied itself to the question whether the plaintiff's suit was maintainable under section 183 of the Land Revenue Act.

Section 233 (*m*) of the Land Revenue Act provides that " no person shall institute any suit or other proceeding in the civil court with respect to claims connected with or arising out of the collection of revenue (other than claims under section 183) or any process enforced on account of an arrear of revenue or on account of any sum which is by this or any other Act realizable as revenue ". There is no ambiguity and there can be no difficulty in ascertaining the meaning of section 233. It raises a general bar against the institution of any suit or proceeding with reference to the several matters enumerated therein, subject to certain exceptions contained in clauses (*i*), (*k*), (*l*) and (*m*). We are here concerned with the exception engrafted upon clause (*m*) which distinctly provides that claims under section 183 of the Act are outside the bar raised by the section. It is argued for the applicant that no *taqavi* loan was due from the plaintiff, that the plaintiff therefore was not amenable to any coercive processes enumerated in section 146 of the Land Revenue Act, and that the scope of section 233 was limited to members of the revenue paying class who had made a default in the payment of revenue; and it did not apply to the case of the plaintiff from whom no arrears were due. This contention receives some countenance and support from the following observations of

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STANLEY, C.J., in *Tulsa Kunwar* v. *Jageshar Prasad* (1) :—

"In the provision that no person shall institute a suit, it seems to me that the legislature had in contemplation the class of persons to whom the Act in its general bearing is applicable, that is, to share-holders liable to pay Government revenue, and not to strangers outside this body. I do not think it was intended to protect the Government against claims in respect of illegal acts done to the detriment of persons who are under no liability to pay Government revenue. It was merely intended to protect the Government against claims of members of the revenue paying class."

BANERJI, J., while recognizing that the language of the section was no doubt very wide, observed that the section forbade a suit by the defaulter against Government or possibly by any other person against the Government. We are of opinion that, in the absence of any ambiguity in the language of section 233, we have to give full effect to the words "no person shall institute any suit or other proceedings" subject to the exceptions set out therein. Where the words of the legislature are clear and unambiguous, it is not our province to scan its wisdom or its policy. The denotation of the word "person" cannot be confined to a member of the revenue paying class to whom the Act in its general bearing is applicable. The framers of the Act were providing a rule barring all members of the general public from instituting suits or other proceedings in civil courts excepting in cases provided for in clauses (*i*), (*k*), (*l*) and (*m*). While providing for these exceptions they did not exclude the case of a person who did not belong to the revenue paying class, or the case of a person from whom no revenue was due. A Bench of this Court, in construing clause (*i*) or (*j*) of section 241 of the N.-W. P. Land Revenue Act (Act XIX of 1873) which corresponds to section 233, clause (*m*) or (*l*), of Act III of 1901, held

(1) (1906) I.L.R., 28 All., 563 (567).

that there was nothing in these clauses to suggest that the exclusion of jurisdiction was limited to claims made by persons actually in default—*The Secretary of State for India in Council* v. *Mahadei* (1). In this case some cattle and a cart belonging to Mahadei plaintiff had been wrongly sold by the tahsil officials for arrears of revenue not due by her, but due by the defendants second party. This Court dismissed the suit against all the defendants. While in accord with the said decision of this Court as to the bar of the suit against the Secretary of State, we are not called upon to decide whether section 241, clause (*i*) or (*j*), was an answer to a suit against the defendants second party. It may be noticed here that the arrears demanded do not appear to have been paid by the plaintiff under a written protest duly signed by her, and this Court was justified in dismissing the suit against the Secretary of State. This decision was followed by STANLEY, C. J. and BURKITT, J., in *Sahai* v. *Bindeshri Singh* (2). Certain cattle belonging to the plaintiff who was a tenant in the village were sold by Pandit Bishun Dat, a Naib-Tahsildar, for recovering arrears of revenue due from the defendants, Bindeshri Singh and Udit Narain Singh who were the zamindars of the village. The suit was dismissed on the ground that the civil court was debarred from entertaining this suit, which was not a claim under section 183, but was clearly a claim connected with, or arising out of, the collection of revenue. We are not concerned with the soundness or otherwise of the decision dismissing the claim against the defaulting zamindars. The Secretary of State was no party to the suit. In view of the general language of section 233, the suit appears to have been rightly dismissed against the defendant Naib-Tahsildar. There is still another case—*Abdullah* v. *Secretary of State for India in Council* (3) in which the case of *The Secretary of State for*

(1) (1896) I.L.R., 19 All., 127. (2) Weekly Notes, 1905, p. 237.
(3) (1927) I.L.R., 49 All., 761.

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India in Council v. *Mahadei* (1) was followed. This case does not call for any detailed reference.

We have next to see whether the plaintiff is entitled to succeed under section 183 of the Land Revenue Act. Section 183 provides :—

" Whenever proceedings are taken under this chapter against any person for the recovery of any arrears of revenue, he may pay the amount claimed under protest to the officer taking such proceedings, and upon such payment, the proceedings shall be stayed, and the person against whom such proceedings were taken may sue the Government in the civil court for the amount so paid; and in such suit the plaintiff may, notwithstanding anything contained in section 145, give evidence of the amount (if any) which he alleges to be due from him.

No protest under this section shall enable the person making the same to sue in the civil court unless it is made at the time of payment, in writing and signed by such person, or by an agent duly authorized in his behalf ".

It has been contended before us that the plaintiff is a person against whom proceedings were taken under chapter VIII of the Land Revenue Act, for the recovery of arrears of revenue, that he paid the amount claimed under a written protest duly signed by him to the officer taking such proceedings. He has therefore a right to sue the Government in the civil court for the amount claimed. In answer to this contention, the respondent relies on *Tulsa Kunwar* v. *Jageshar Prasad* (2), already referred to, where it was held that the suit contemplated by the section is a suit by the defaulter and not by a third party. In our view of the case, the word " defaulter " in the Land Revenue Act has a technical meaning, and it includes the case of every person in regard to whom a certificate has been granted under section 145 of the said Act. It is agreed that the procedure for realization of *taqavi* dues has been prescribed in chapter VIII of the Land Revenue Act and in no other Act. Before any coercive

(1) (1893) I.L.R., 19 All., 127. (2) (1906) I.L.R., 28 All., 563.

measures enumerated in section 146 can be initiated or enforced against any person who is said to be in arrear of revenue, a statement of accounts must be certified under section 145 of the Act by the Tahsildar for purposes of Chapter VIII, which deals with collection of revenue. This certificate is conclusive evidence of the arrear, of its amount and of the person who is the defaulter. This rule of evidence incorporated in section 145 appears to be grounded upon fiscal considerations and upon broad principles of public expediency, with this object in view that public revenue may be realized with the greatest expedition. Whether, therefore, a certain sum of money realizable as revenue is due from a particular person or not, if the Tahsildar certifies that the said sum of money is recoverable from him, a finality attaches to the certificate, and the person certified against must be taken to be a defaulter within the meaning of the Act. In other words, the person treated as a defaulter is placed on the same footing as the actual defaulter.

Under section 5 of the Agriculturists Loans Act (Act XII of 1884) a *taqavi* loan is recoverable as if it were an arrear of land revenue. The procedure for recovery of arrears of land revenue is provided for in chapter VIII of the Land Revenue Act. The initial step is the certificate given by the Tahsildar which affords the basis for further proceedings. Section 146 provides that an arrear of revenue may be recovered by attachment and sale of his movable property; and section 149 authorizes the Collector to attach and sell his movable property. Where proceedings, therefore, have been taken under chapter VIII against *any person*, which includes the case of a person situated like the present plaintiff from whom as a matter of fact no *taqavi* loans were due, he is entitled to use the Government in the civil court if he fulfils the requirements of section 183. The right of suit is given to the person against whom proceedings are taken under

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chapter VIII and it does not matter whether or not he belongs to the revenue paying class, and whether or not he is a person from whom *taqavi* loans are actually due.

There are no provisions in the Land Revenue Act corresponding to the provisions contained in order XXI, rules 58—63, of the Code of Civil Procedure. Again there are no provisions made in the Land Revenue Act whereby the attachment or sale of movable property may be set aside on the ground of any irregularity or illegality in the proceedings. To make up for these omissions the legislature appears to have given a right of suit to the person aggrieved under section 183 of the Land Revenue Act and we are not prepared to hold that the case like the present was a *casus omissus*.

We hold, therefore, that all the conditions necessary for the maintainability of a suit against the Government are fulfilled in this case, and the lower appellate court was not justified in dismissing the suit in its entirety under section 233 (*m*).

It was contended on behalf of the respondent that section 183 did not apply to a case which was not for recovery of Government revenue but where the amount was made recoverable by the same process as applied to Government revenue. We do not think that this is a plea of substance, and it is indeed concluded by the decision of the Privy Council in *Balwant Singh* v. *Secretary of State for India* (1). This was a suit for the recovery from the Secretary of State of a sum of money wrongly realized from the plaintiff, who was the proprietor, under the head of canal dues. Under section 45 of the Northern India Canal and Drainage Act, canal dues are realizable as revenue. The suit was contested *inter alia* on the ground that section 241 of the Land Revenue Act of 1873 barred the institution of the suit in the civil court. Their Lordships agreed with the High Court in holding that

(1) (1903) I.L.R., 25 All., 527.

" the subject of the action is either a claim connected with, or arising out of, the collection of revenue, or else it is a claim for a sum which is realizable as revenue," and the suit was barred by section 241. In another part of the judgement their Lordships made the following observations which we may usefully reproduce here :

" The exception ' other than claims under section 189 ' appears to their Lordships to throw some light upon the meaning of the section, because section 189 enables a party, from whom revenue is demanded, to pay under protest, and upon such payment being made . . . . . may sue the Government for the amount so paid in any civil court . . . . . That is an exception from what the Act describes as 'claims connected with, or arising out of, the collection of revenue '. It will be observed that it is a claim exactly of the same description as the present one. It is the claim of a person who says that revenue has been wrongfully demanded from him which he was not under any obligation to pay, and the only difference is that if he pays it when it is demanded from him, under protest, then he has a right, subject to the pecuniary limitations prescribed by the law, to sue the Government to recover it as money paid by him under a mistake. The exception does not apply to this case, because at the time when the money was paid, there was no protest, and it was paid by the officer of the Raja under a common mistake as money that was due from him, but though that section does not apply, it illustrates what is intended to be included in claims ' connected with, or arising out of, the collection of revenue, or on account of any sum realizable as revenue '. The effect of the latter words in the section is to make the earlier part applicable not only to revenue properly so called, but also to sums realizable as revenue ".

The above is a complete answer to the defendant's contention and supports our decision.

The plaintiff is therefore competent to maintain a suit against the Secretary of State for the recovery of the amount paid by him to the officer taking proceedings against him under chapter VIII of the Land Revenue Act. His right of suit is restricted to the *recovery of*

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the amount paid. He is not competent to sue the Government for damages either for the price of milk or the buffalo calf. We, therefore, disallow this part of the plaintiff's claim.

The learned Subordinate Judge has relied upon *The Secretary of State for India in Council* v. *Sukhdeo* (1) for the proposition that the Government cannot be made liable for the act of the Naib-Tahsildar in attaching the she-buffalo. This case was not founded upon section 189 of Act XIX of 1873. One Nathe was sentenced under section 417/511 of the Indian Penal Code to six months' rigorous imprisonment and a fine of Rs. 200. The Magistrate having issued a warrant for the levy of the fine by distress and sale of the movable property of Nathe, the property of Sukhdeo plaintiff was seized and sold. The latter instituted a suit for damages against the Secretary of State. It was held that the Crown was not liable to pay compensation for the illegal acts of its servants but was bound to make restitution to the extent it has benefited by the illegal acts. Obviously this case has no application to the present case.

The result of our decision, therefore, is that the plaintiff is entitled to succeed in part. We set aside the decrees of both the courts below and pass a decree in plaintiff's favour for recovery of Rs. 80-12-11 with proportionate costs in all courts.

Application allowed in part.

(1) Weekly Notes, 1898, p. 173.

APPELLATE CRIMINAL

Before Mr. Justice Lindsay, Acting Chief Justice.

EMPEROR *v.* SUR NATH BHADURI.*

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July, 28.

Act No. XLV of 1860 *(Indian Penal Code), section* 194—*"Causing a circumstance to exist"—Bringing tutored evidence before a court—Charge translated into Urdu and read out to jury by Government Pleader—Procedure.*

Held that a person who brings before a court a witness whom he has tutored to tell a false story concerning the case before it, may properly be convicted under section 194 of the Indian Penal Code. *Emperor* v. *Cheda Lal* (1) and *Durga Prasad* v. *Emperor* (2), referred to.

A Sessions Judge having a rather complicated charge to deliver to a jury, and not feeling quite sure that he had sufficient Urdu to be able to make himself perfectly intelligible to them, wrote out his charge in English and then got the Government Pleader to translate it and read it to the jury. *Held* that this procedure was not illegal.

THE facts of this case sufficiently appear from the judgement of the Court.

Mr. *A. Sanyal*, for the appellant.

The Government Advocate (Pandit *Uma Shankar Bajpai*), for the Crown.

LINDSAY, A.C.J.—The appellant, Sur Nath Bhaduri, has been convicted in the Court of Sessions at Benares on a charge under section 194 of the Indian Penal Code and has been sentenced to five years' rigorous imprisonment. The trial was with a jury and, according to what is stated, the jury returned a unanimous verdict of "guilty" of an offence under the section just named.

An appeal from a conviction had after trial by jury is only admissible on points of law. The petition of

*Criminal Appeal No. 459 of 1927, from an order of K. A. H. Sams, Sessions Judge of Benares, dated the 7th of April, 1927.

(1) (1907) I.L.R., 29 All., 351. (2) (1915) 30 Indian Cases, 651.

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appeal which is before me enumerates eight points. They may, however, be reduced to a smaller number.

To put the case briefly, this man, Sur Nath Bhaduri, was charged with the offence known as the fabrication of false evidence. According to the charge, as framed by the Magistrate who committed the accused for trial, there was only one charge, namely, that this accused had produced a man named Nil Ratan Banerji before the District Magistrate of Benares to make a false deposition concerning a case of murder. The charge, however, seems to indicate that two other allegations were made against the accused, namely, that in order to support the false statement which was intended that this man Nil Ratan should make, the accused fabricated other false evidence, namely, by inducing two witnesses, named Sita Ram Gond and Shib Chandra Mukerji, to come forward and make false statements, and that the accused in order to further his intention in the matter of procuring false evidence, planted or caused to be planted a certain weapon in the house of Anant Pergash Thakur. I do not know whether the intention of the Magistrate was that the accused should be indicted on separate charges. All I find is that this charge is described as a charge with one head.

The substance of the case is as follows :—It appears that some time previous to the commission of this offence a Bengali had been murdered at Narad Ghat in Benares in mysterious circumstances. A body was found with the head cut off and this was afterwards identified as being the body of one Nagendra Nath Banerji.

It is made to appear that the present appellant came into touch with the District Magistrate of Benares, Mr. Mehta, and that it was suggested to the accused that he might find out something about this murder. The accused, it is said, promised Mr. Mehta that he

would make inquiries and it was in performance of this promise that the offence charged is said to have been committed. Some time after his interview with Mr. Mehta it was proved that the accused brought forward this man Nil Ratan, who made a long statement in which he admitted having taken part in the murder, and he incriminated two other Bengalis, who, according to the evidence, were arrested. This man Nil Ratan was taken into custody and sent to the jail and at a later stage the two witnesses whose names I have mentioned, namely, Gond and Mukerji, were put forward in order to corroborate Nil Ratan's story. Their statement broke down and it came out that Nil Ratan had been tutored by the accused to come forward with a story which was eventually found to be false. That is the sum and substance of the case against the accused Bhaduri.

Coming now to the law points which are raised in the petition of appeal, I take points 1 and 2 together, because they amount to a plea that on the facts, as stated by the prosecution, the accused was not liable to conviction under section 194 of the Indian Penal Code. The argument is that according to the definition of fabrication as contained in section 192 of the Code, the tutoring of a man to give false evidence does not amount to what the section describes as the "causing of a circumstance to exist".

In the course of the trial in the court below a case was cited before the Sessions Judge, *Durga Prasad* v. *Emperor* (1). That was a case decided by a single Judge of this Court who seems to have been of the opinion, although the judgement is not a reasoned one, that the suborning of a false witness does not amount to the fabrication of false evidence under section 192.

(1) (1915) 30 Indian Cases, 651.

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I am unable to accept the law as laid down in that ruling and I am confirmed in my opinion by the judgement of another learned Judge of this Court, which is to be found in *Emperor* v. *Cheda Lal* (2). That was a case in which the accused produced a number of men before a court, who could not be identified by the prosecution witnesses. It further appeared in that case that when the accused was asked where the man whose identification it was sought to establish was, he pointed out another man who was discovered to be wearing a false moustache and who was not the man whose identification was wanted. At page 353 of the report Mr. Justice BANERJI refers to the essential elements of the offence of fabricating false evidence as described in section 192 of the Indian Penal Code. The first of these is "causing the existence of any circumstance". Mr. Justice BANERJI was of opinion that the accused in that case, Cheda Lal, by placing before the Magistrate a person who was not his brother Debi and representing that he was Debi, caused a circumstance to exist; and so, when it is found that the accused, after inspiring Nil Ratan with an absolutely false story of the murder, brought Nil Ratan before the District Magistrate who took down his statement, I am of opinion that in these circumstances the accused Bhaduri did cause a circumstance to exist. It is in my opinion impossible to argue that on the facts, as they were stated by the prosecution witnesses and as found by the jury, the accused was not liable to conviction under section 194.

In the third ground a plea is taken with regard to that portion of the charge which related to the "planting" of a weapon. It is said that there was no evidence on record that the appellant planted the weapon or caused it to be planted. There again I am unable to accept the argument. There was evidence on the record from

(1) (1907) I.L.R., 29 All., 351.

which the jury, if they were so minded, could come to the conclusion that the accused either placed the weapon himself where it was found or got some one else to do it.

In the fourth ground of appeal the procedure of the court below is attacked. It is said that the jury returned a unanimous verdict of "doubt" on the second head of the charge and that the learned Judge improperly asked the jury to retire again and re-consider their verdict. I am not quite sure what a unanimous verdict of doubt means, but from the affidavits which have been produced in this Court, it is made to appear that when the Judge asked the jury for their opinion about that part of the case relating to the planting of the weapon, the foreman of the jury hesitated and then informed the court that the jury had not considered that part of the case and it was for this reason that the Judge sent the jury back in order that that part of the case might be considered. It was after this that the unanimous verdict of "guilty" was returned. I see nothing wrong in the procedure of the court below.

Then it is said that the Sessions Judge acted contrary to law in adjourning the case for a week after the Government Pleader and the counsel for the accused had addressed the jury. It is said that this illegal procedure has caused failure of justice. I do not see how the adjourning of the case for a week constitutes any illegality. It is inevitable that cases should be adjourned and in this particular case the hearing had to be adjourned for a week on account of the intervention of certain holidays and because the learned Sessions Judge was sent off somewhere else for a day or two on special duty. There can be no question of illegality having arisen in this way. The suggestion is that by the time the hearing was resumed the jury had forgotten all about the arguments and ought to have been addressed again. I do not think there is any provision in law for action of this kind.

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Then it is said that the learned Sessions Judge acted improperly in delivering his charge to the jury through the Government Pleader. It is, I think, the right course for a Judge to charge the jury himself; but there are difficulties in the way of doing this if the Sessions Judge does not happen to be sufficiently acquainted with the Urdu language so as to be understood by the jury. In the present case the learned Judge candidly admits that in view of the technical language necessary to describe the offence of fabrication of false evidence he did not feel competent to address the jury himself with any confidence that they would understand what he was saying to them. He wrote out a very long charge dealing elaborately with all the evidence and all the points in the case and I understand that this, after being translated into Urdu, was read to the jury by the Government Pleader. I am not prepared to say that there was any illegality in this procedure. The important thing is that the review of the evidence made by the learned Judge should be placed before the jury in a manner which they can understand, and if unfortunately the presiding Judge is unable to express himself in Urdu with sufficient fluency, he must of necessity resort to some other means. I reject this plea of illegality.

Then it is said that the learned Judge misdirected the jury because he did not draw their attention to certain statements and circumstances favourable to the case of the accused. On this point, all I have to say is that I have read the whole of the evidence which was recorded before the Sessions Judge and I have also read the entire charge which was delivered by translation to the jury. I do not think it is made to appear that the learned Judge withheld from the jury anything which he was bound to put before them. It seems to me that he has stated the case very fairly in the written charge which is upon

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the record, and that being so, I cannot accept any plea that there has been any prejudice to the accused.

As for the last plea, which is a plea *ad misericordiam*, I cannot accept any suggestion that a sentence of five years' rigorous imprisonment for the concoction of false evidence intended to implicate two men on a charge of murder is in any way too severe. The learned Judge says he would have passed a much heavier sentence except for the recommendation of the jury on account of the appellant's being in a weak state of health. I dismiss this appeal.

Appeal dismissed.

PRIVY COUNCIL.

J. C. 1928 *January*, 23.

BHAGWATI AND ANOTHER (PLAINTIFFS) *v.* BANARSI DAS AND OTHERS (DEFENDANTS).*

[On Appeal from the High Court at Allahabad.]

Act No. IV of 1882 *(Transfer of Property Act), section* 55, *clause* (1) *(g)—Act No. IX of* 1872 *(Indian Contract Act), section* 69*—Sale of immoveable property—Discharge of incumbrance—Purchaser discharging undisclosed mortgage—Liability of vendor—Construction of contract.*

A stipulation in a contract for the sale of immoveable property that in the event of part of the property being sold as the result of an undisclosed incumbrance the vendor shall repay a proportionate part of the consideration, does not affect the vendor's obligation under section 55, clause (1) *(g)* of the Transfer of Property Act, 1882, to pay incumbrances, nor the consequent right of the purchaser under section 69 of the Indian Contract Act, 1872, to recover from the vendor the amount paid in discharge of a mortgage decree obtained after possession has been taken.

Decree of the High Court reversed.

**Present* :—Lord SHAW, Lord CARSON and Sir LANCELOT SANDERSON.

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BHAGWATI v. BANARSI DAS.

APPEAL (No. 91 of 1926) from a decree of the High Court, reversing a decree of the Subordinate Judge of Aligarh.

In 1907 the predecessors in interest of the respondents sold certain immoveable property to the predecessors in interest of the appellants by a deed of sale, the material provisions of which appear from the judgement of the Judicial Committee. The vendees paid the price and obtained possession. Subsequently it was discovered that the property was subject to a mortgage executed in 1882 in addition to the mortgage mentioned in the deed of sale. Under this mortgage of 1882 a mortgage decree was made in 1914 against both the vendors and vendees. In 1920 the decree was put in execution, and the present appellants were compelled to pay thereunder Rs. 13,234.

The appellants brought the present suit to recover that sum.

The Subordinate Judge made a decree allowing the claim, but it was set aside by the High Court. The learned Judges (MUKERJI and DALAL, JJ.) were of opinion that the clause in the sale-deed set out in the present judgement excluded the obligation of the vendors under section 55, sub-section (1) (*g*) of the Transfer of Property Act, 1882.

1928. January, 23.

Dube, for the appellants.

Hyam, for the respondents Nos. 1 to 5.

THE judgement of their Lordships was delivered by Lord SHAW :—

This is an appeal from a decree of the High Court of Judicature at Allahabad which reversed a judgement and decree of the Subordinate Judge of Aligarh.

The question is a short and simple one. It arises under section 55, clause (1) (*g*) of the Transfer of

Property Act, and the bearing thereon of the terms of a particular contract of sale.

The parties were vendor and vendee of a certain piece of immoveable property. Section 55 is expressed in terms of a very absolute and clear character. It provides, the irrelevant parts of the section being omitted, that in the absence of " a contract to the contrary," the buyer and the seller of immoveable property are subject to liabilities and have rights, in the enumeration of the elementary proposition that the seller is bound to discharge all incumbrances then existing on the property. It is said, however, that this statutory obligation was negatived in the particular circumstances of this case by reason of the terms of the contract of sale.

The fact is that there had been more than one mortgage existing on the property prior to the transaction of sale. But the language of the deed of sale recognizes only one of those mortgages and makes no mention of the others. " The said property " (says the sale-deed) "is mortgaged to Parshadi Lal, son of Tika Ram . . . under a mortgage-deed for Rs. 4,000." *Quoad ultra* this deed is an absolute and unreserved disposal by sale of the property, unencumbered and free from all mortgage. The language of the deed of sale is that, apart from the Parshadi Lal mortgage, " the property is up to this date free from all rights of transfer by sale, mortgage," etc. There is an absolute declaration by the vendor to the vendee that he is buying the property free from all mortgages and covenants, except the one that has just been named.

It may reasonably be asked: Up to that point is there any " contract to the contrary " of the terms of the statute? There is none.

But the contract provided further: " If, God forbid, any person comes forward as partner or co-sharer and brings a claim, or if an encumbrance, etc., is found

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in respect of the whole or part of the property sold, and as a result of his claim the property pass out of the possession of the vendees, we, the vendors, shall pay to the vendees, the consideration of this sale-deed to the extent the property sold passes out of their possession." It is said that that provision is exclusive of all other rights on the part of the vendee.

It is sufficient in their Lordships' opinion to point out that no such event ever happened. The property did not pass out of the possession of the vendee. The vendee stuck to his property, but he was forced in a court of law to answer the rights of the mortgage holder, and to meet another mortgage of a very considerable amount. Certain legal proceedings were taken, and a decree of the High Court was granted putting in execution this other mortgage and the vendees, that is to say, the present appellants, were compelled to pay the sum of Rs. 13,204. In their Lordships' opinion that sum was paid under compulsion, and, secondly, it was undoubtedly a payment for which they were, and are, entitled to be recouped from the vendor of the property for a payment so made.

It is of no use reciting the law to this effect: the law is plain. Under section 69 of the Contract Act it is clear this was payment of money which another was bound to pay by law and, therefore, the person who paid it is entitled to be re-imbursed by the other party.

With regard to the last portion of the sale-deed, which states what is to ensue in the event of the vendees being put out of possession, it may, of course, be an additional safeguard, it may have been a thing suggested by the parties to cover contingencies which were not yet wholly foreseen, but that it contradicts or restricts the wider language of the contract of sale or that it either narrows or wipes out the obligations under the statute cannot be maintained.

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On those grounds their Lordships cannot uphold the judgement under appeal, and they think that the Subordinate Judge was right and his judgement should be restored and that the appellants should be awarded costs from the date of that judgement, including the costs of this appeal. Their Lordships will humbly advise His Majesty accordingly.

Solicitor for the appellants: *H. S. L. Polak.*

Solicitors for the respondents Nos. 1 to 5: *Barrow, Rogers,* and *Nevill.*

NARSINGH RAO (PLAINTIFF) *v.* MAHA LAKSHMI BAI AND ANOTHER (DEFENDANTS).*

J. C. 1928 *January*, 31.

[On Appeal from the High Court at Allahabad.]

Hindu law—Deed of settlement—Construction of deed—Gift to wife—Defeasance—Condition subsequent—Invalid condition—Act No. IV of 1882 *(Transfer of Property Act), sections* 28, 30.

A deed of settlement executed in 1875 by a Hindu recited that his only surviving son *B* being of bad character and his declared enemy, he was compelled to exclude him from inheritance, and that there being nobody to represent the settlor except his surviving wife (the Rani), he had, therefore, made a gift to her of all his properties, together with all rights and interests, and he appointed her his successor and representative subject to conditions which followed. By condition 1, the zamindari and *malguzari* in five villages were to be "owned by the Rani just as I owned" them. By condition 2, he made a gift of the *jagir* property in seven villages to the Rani, reserving to himself the income during his life. By condition 6, if during the succeeding 16 years a lawful son were born to *B*, he should take the property on attaining majority, but if at the end of that period no son had been born, the Rani could give or bequeath the property to her daughter, or her daughter's son, and failing them could make an adoption. The

Present:—VISCOUNT SUMNER, LORD ATKINSON, LORD SINHA, SIR JOHN WALLIS and SIR LANCELOT SANDERSON.

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settlor died in 1879. The appellant, a son of *B*, born in 1894, after attaining his majority, sued for possession. Conceding that the gift to him was void in Hindu law, since he was not born at the date of the deed, he contended that on the true construction of the deed the Rani's interest terminated on his attaining his majority, and that he was entitled as heir to the settlor.

Held that on the true construction of the deed the Rani and her successors took an estate which was not limited but absolute in point of duration, and that, according to the principle embodied in the Transfer of Property Act, 1882, sections 28, 30, the condition subsequent being invalid, her estate was not affected by it; and accordingly that the suit failed. *Doe* v. *Eyre* (1), distinguished.

APPEAL (No. 57 of 1925) by special leave from a decree of the High Court (May 19, 1921) affirming a decree of the Additional District Judge of Aligarh (August 2, 1918).

The appeal, as it was ultimately presented, depended exclusively upon the true construction of a deed of settlement executed on the 4th of September, 1875, by Jaswant Rao, the owner of an estate of great value in the Province of Agra.

The suit was instituted by the appellant who claimed the estate as the only son of Balwant Singh, who died in 1899. A provision in the deed in favour of any son who should be born to Balwant being inoperative in Hindu law, the plaintiff by his plaint claimed that the estate conferred by the deed upon the Rani and her successors terminated upon his attaining his majority, and that he was entitled as heir to Jaswant Rao.

The deed of the 4th of September, 1875, is fully set out in the judgement of the Judicial Committee.

The Additional District Judge, to whose court the suit was transferred, found on the evidence that the

(1) (1848) 5 C.B., 713.

plaintiff had failed to establish that he was the legitimate son of Balwant. He was also of opinion that on the true construction of the deed the plaintiff, even if his paternity were established, was not entitled to the property in suit. Accordingly he made a decree dismissing the suit. An appeal to the High Court was dismissed by a judgement delivered on the 11th of May, 1921. The learned Judges (MEARS, C. J. and BANERJI, J.), agreed with the above finding of fact and affirmed the decree, the construction of the deed was not dealt with.

On the 10th of August, 1922, an Order in Council was made granting special leave to appeal.

By an Order in Council made on the 26th of July, 1926, the suit was remitted to the High Court to reconsider the whole case having regard to certain further evidence which had been recorded in London in pursuance of an application by the appellant. The nature of that evidence and the terms of the order appear from the present judgement.

The High Court having reconsidered the case, with the additional evidence, delivered a further judgement on the 11th of May, 1927. The learned Judges (MEARS, C. J., and DALAL, J.), were of opinion that, having regard to the further evidence, the plaintiff had established that he was the legitimate son of Balwant. On the construction of the deed they held that though the words in the preamble and clause 1 were sufficient to bestow upon the Rani full proprietary rights, the later clauses restricted her interest to the period ending in 1912, when the plaintiff attained his majority. They were further of opinion that even if the deed conferred an absolute estate subject to defeasance, that estate terminated upon Balwant's son attaining majority, although the gift to him was invalid.

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1927. November 21, 22, 24, 25. Sir *John Simon*, *K.C.*, *Maugham*, *K.C.*, *Kenworthy Brown* and *Motilal Nehru* for the respondents (1). The Privy Council decided in *Balwant Singh* v. *Rani Kishori* (2), that the property now in suit was self-acquired. The earlier part of the deed conferred on the Rani an absolute gift; the later clauses made the gift subject to defeasance in certain events, but did not otherwise affect its nature. It is well established in English law that if a gift is subject to a condition subsequent, the invalidity of the condition does not affect the character of the gift; Co. Litt., paragraph 206*a*, Sudgen on Powers, eighth edition, page 526. That principle is embodied in the Transfer of Property Act, 1882, sections 28, 30. The Indian Succession Act, 1865, does not apply to this case, but it is noticeable that the same principle is there adopted: see sections 118, 120, contrasted with section 121. The words of gift being of sufficient amplitude, the Rani took an absolute estate, even though she had not an absolute power of alienation: *Ramachandra Rao* v. *Ramachandra Rao* (3), *Prosunno Coomar Ghose* v. *Tarrucknath* (4): *Mayne's* Hindu Law, paragraph 664. The object of the deed was to settle the estate to the exclusion of the settlor's son, but at the date of the deed it was very likely that the settlor's son would succeed if the deed had the meaning and effect which the plaintiff attributes to it. *Doe* v. *Eyre* (5), which was relied on by the High Court, is distinguishable. As was explained by JESSEL, M.R., in *Hurst* v. *Hurst* (6) the will there under consideration showed an intention that there should be a forfeiture of the prior estate upon the happening of the event. That was also the case in

(1) Having regard to the judgement on remand the burden of the appeal was on the respondents.
(2) (1898) I.L.R., 20 All., 267.
(3) (1922) I.L.R., 45 Mad., 320 (327, 328).
(4) (1873) 10 Beng.L.R., 267.
(5) (1848) 5 C.B., 713.
(6) (1882) 21 Ch.D., 278 (293).

Robinson v. *Wood* (1). The deed now under consideration cannot be so construed, the intention was to terminate the Rani's estate only in the event of a grandson succeeding under the deed.

Upjohn, K.C., Sir *George Lowndes, K.C.*, and *Dube*, for the appellant:—On the true construction of the deed the Rani took the estate in a fiduciary or quasi-fiduciary capacity to protect it pending the majority of a grandson. Until that event she was to represent the settlor, and upon its happening her estate was to end. The decisions in *Doe* v. *Eyre* (2) and *O'Mahoney* v. *Burdett* (3) are precisely in point. The Transfer of Property Act, 1882, was not enacted at the date of the deed, and does not apply. The word "conditions" in the deed is not used in the technical sense of a "condition subsequent." The words "as I owned it" in the case of a gift to a wife do not connote the full estate: *Harilal* v. *Bai Rewa* (4). The power to appoint is inconsistent with an absolute estate, especially as the appointees are referred to as the settlor's heirs, not the Rani's. In property given by a Hindu to his wife she may have either a woman's estate, in which case it descends to his heirs, or an absolute estate in which case it descends to hers. The respondents contend here for a mixed estate, namely absolute but without a power of alienation. There is no reported case of a woman's estate of that character, and it would give rise to difficulties: *Koonjbehari Dhur* v. *Premchand Dutt* (5). It is an essential of *stridhan* that the holder should have a right of disposal during her life: *Venkata Rama Rao* v. *Venkata Suriya Rao* (6). The deed should be construed according to the ideas of Hindus, and, therefore, in a manner to provide a succession of male heritors: *Mahomed Shumsool Hooda* v. *Shewukram* (7).

(1) (1858) 27 L.J.Ch., 726.
(2) (1848) 5 C.B., 713.
(3) (1874) L.R., 7 H.L., 388.
(4) (1895) I.L.R., 21 Bom., 376.
(5) (1880) I.L.R., 5 Cal., 684.
(6) (1880) I.L.R., 2 Mad., 323 (335).
(7) (1874) L.R., 2 I.A., 7 (14).

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Sir *John Simon*, *K.C.*, in reply. Both *Koonjbehari Dhur's* case (1) and *Harilal's* case (2) are inconsistent with *Surajmani* v. *Rabi Nath Ojha* (3) and more recent decisions of the Board, and the former was commented on in *Janki* v. *Bhairon* (4) where it was stated that in Hindu law a husband could give property to his wife as her *stridhan* without giving her a power of alienation.

1928. *January*, 31. The judgement of their Lordships was delivered by Sir JOHN WALLIS :—

This appeal was by the plaintiff Narsingh Rao, son of Balwant Singh and grandson of Raja Jaswant Rai, both deceased, against the first defendant, Rani Kishori, since deceased, the widow of Jaswant Rai, the second defendant, her daughter, Beti Maha Lakshmi Bai, and the third defendant, Musammat Rameshwar Debi, widow of Lal Raghubans Rao, the second defendant's son. The plaintiff claimed to recover the immoveable properties which were the subject of a conditional deed of gift executed on the 4th of September, 1875, by Jaswant Rai in favour of the first defendant, his junior wife. The plaintiff claimed that under the deed of gift he was entitled to succeed to those properties on attaining majority and that, even if the provisions of the deed in his favour were inoperative as opposed to the rules of Hindu law, still Rani Kishori took only an estate limited in point of duration which determined when he attained majority, so that he thereupon became entitled to take as heir of the settlor Jaswant Rai.

The District Judge found that the plaintiff had failed to prove that he was the legitimate son of Jaswant Rai's only son, Lal Balwant Singh, and that, even if he were legitimate, he was only entitled to take the estate by virtue of a condition subsequent terminating the estate limited to the Rani and her successors in the event of his attaining majority, and that this condition of de-

(1) (1880) I.L.R., 5 Calc., 684.
(2) (1895) I.L.R., 21 Bom., 376.
(3) (1907) I.L.R., 30 All., 84.
(4) (1896) I.L.R., 19 All. 133 (134

feasance, being illegal and void under Hindu law as created in favour of an unborn person, according to the decision of this Board in *Tagore* v. *Tagore* (1), was inoperative and void and left the Rani's estate unaffected.

When the case came before the High Court on an appeal by the plaintiff against the decree of the District Judge dismissing the suit, the learned Judges dismissed the appeal on the ground that the plaintiff had failed to prove his legitimacy, and did not go into any other question. In coming to this conclusion, they attached great weight to the fact that the plaintiff's mother had refused to submit herself to a medical examination with reference to the question whether she had ever borne a child. The plaintiff having obtained special leave to appeal from this decree, presented a petition to His Majesty in Council praying that medical evidence on the question should be heard and recorded. His prayer was granted, and two lady gynæcologists, having examined the plaintiff's mother and certified that she had given birth to a child, and both parties having agreed to be bound by this certificate, subject to proof as to the identity of the lady examined, the case was remitted by an order of His Majesty in Council to the High Court with a direction that in the event of their being satisfied as to the identity of the person so examined, the High Court should reconsider the whole case on the footing that the certificate was correct and pass judgement thereon, and that the appeal should stand over, with liberty to either party to restore or amend it as they might be advised after the High Court had passed its judgement. After a rehearing on remand the High Court delivered judgement, holding, in the light of the new evidence, that the plaintiff was the legitimate son of the late Balwant Singh, and that, though the provisions in the deed in his favour were void under Hindu law, as he was not

(1) (1872) L.R., I.A., Supp., 47.

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in existence at the date of the deed, still on a true construction of the deed of gift the first defendant's interest was determined on the plaintiff's attaining majority, and that his father Balwant Singh being then dead, he became entitled to come in as next heir of the settlor.

The plaintiff's appeal to His Majesty in Council against the judgement and decree of the High Court has again come on before their Lordships, and in view of the fact that the remand judgement was in favour of the plaintiff appellant, the case has been argued before their Lordships as if the respondents on the record were appealing from that judgement.

At the outset Sir *John Simon*, who appeared for the respondents, disclaimed any intention of questioning the finding of the High Court in favour of the plaintiff's legitimacy, which must, therefore, be taken to be established. On the other hand, the finding of both the lower courts that the provisions of the deed in favour of the plaintiff, who was not then born, were illegal and void, has not been questioned on his behalf. The sole question, therefore, for their Lordships in this appeal is whether, as contended for the defendants, on the true construction of the deed the Rani took the estate, subject to a condition of defeasance in the event of the plaintiff's attaining majority, and this condition subsequent being void, the Rani was entitled to retain the estate freed from the condition, or whether, as contended for the plaintiff and held by the High Court, the Rani only took a limited estate as custodian of the property until the plaintiff attained majority, when her estate was determined, and the provision in favour of the unborn son being illegal, the estate passed as on intestacy to the heir of the settlor—that is to say, to the plaintiff.

It will be convenient, in the first instance to set out the following table showing the relationships of the parties in the suit to the settlor, Jaswant Rai :—

1. Ratan Kuer = Raja Jaswant Rai (donor) = 2. Rani Kishori
d. 2nd of Oct., 1880. d. 24th of Aug., 1879. (1st defendant), d. 23rd of May, 1921.

Lal Balwant Singh = 1. Naraini Kuer (no issue). daughter Maha Lakshmibai,
b. 1841. (16th of June. 1834). b. 1868
convicted 2nd of Sept., 1871, = 2. Kaithi Wali Lady (no issue and predeceased husband). (2nd defendant and 1st respondent)
released from prison Aug. 1883, d. 21st of Jan., 1899.
= 3. Dunajan, married 1890.

son
Lal Raghubans Rao = Rameshwar Debi (3rd defendant and 2nd respondent).
d. without issue, 1911.

Narsingh Rao (plaintiff), b. 2nd of Mar., 1894.

In 1875, at the date of the deed, Raja Jaswant Rai, the settlor, had a son by his senior wife, Lal Balwant Singh, aged 34, who was then in prison undergoing a sentence of 13 years' imprisonment for culpable homicide, and a daughter, Maha Lakshmi Bai, aged 7, the second defendant by his junior wife, Rani Kishori, the first defendant.

It appears clearly from the recitals in the deed, which is set out below, that the settlor's intention was to disinherit his unworthy son, Balwant Singh, as regards his self-acquired property. It appears equally clearly from the body of the deed that his intention was that, if Balwant had a son, that son on attaining majority should have the estate. This was a very natural wish on the part of a Hindu, and it is what would have happened if effect could be given to the deed according to its terms. Unfortunately, under a rule of law which has now been altered by the legislature but not retrospectively, the provisions of the deed in favour of Balwant's unborn son are void and inoperative, and the plaintiff has, therefore, to show that, on the true construction of the deed,

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there was an intestacy when he attained majority by reason of the failure of the gift over in his favour and that he became entitled to come in as heir of the settlor.

It is unnecessary to set out the earlier recitals showing that the property, which was the subject of the gift, was the self-acquired property of the donor, but it may be mentioned that, after his release from prison, Balwant Singh sued to recover the properties included in the deed on the grounds that they were joint family property and that, even if they were not, the donor had no power to dispose of self-acquired immoveable properties. This came before this Board on appeal to His Majesty in Council in *Balwant Sing* v. *Rani Kishori* (1) when both these contentions were rejected and the decree of the appellate court dismissing the suit was affirmed.

The rest of the deed was as follows :—

"I am now 63 years old, and weakness and loss of strength are soon coming on, and there is no hope of an issue being born to me, and out of the two sons and a daughter born, Lal Balwant Singh is the eldest, who has, since attaining majority, proved himself unworthy and of bad character; that in spite of the instructions that were conveyed to him to correct his morals, he tried to make himself worse, and openly declared himself to be my enemy, inasmuch as, in consultation with the wishes of the officers for the time being, an agreement was obtained from him to the effect that he would get Rs. 100 per month and improve and correct his morals, but it did no good and he began to commit heinous offences without even fearing the officers for the time being; that at last he had been committed to prison for 13 years on a charge of murder, and he is still in jail; that, looking to these facts, I was compelled to exclude him from right of representing me and from inheritance, under a petition, dated the 5th of August, 1872, and the younger son's life did not last, having died when only 18 months old. I have now only one daughter, aged 7. I had two Ranis, one the mother of Lal Balwant Singh, who died of the grief brought about by the misconduct and misdeeds of her son, and the other, Rani Kishori, who is still

(1) (1898) I.L.R., 20 All., 267.

alive. Therefore, for maintaining the name and protecting the property, it is necessary that there should be some representative, and my old age and uncertainty of continuous breathing stand in the way of delay, and besides Rani Kishori, my younger wife, there is no one else entitled to represent me. I have, therefore, made a gift in favour of Rani Kishori, all my moveable and immoveable properties, together with all the rights and interests, both inherent and adventitious, all and in every shape, and appoint her my successor and representative, subject to the following conditions :—

I. That the zamindari and *malguzari* in five villages, Lakhna, etc., as *lakhiraj* in perpetuity, belonging to me, would as well be owned by the Rani Sahiba just as I owned it, and all the rights both inherent and adventitious and *saier* and cesses, etc., appertaining to the zamindari would be in her possession just as I owned it, and complete possession has from this date been delivered to her and petitions would be presented in revenue courts, I would get her name entered in lieu of that of mine.

II. That the *jagir* property in seven villages, Biaspur, etc., I make a gift of in favour of the Rani Sahiba, but I shall appropriate their income during my lifetime, and would, from time to time, spend that income at my pleasure; but whatever would out of this income be left as surplus after my death and ten per cent. that may for the future be fixed as *malikana*, the Rani Sahiba would be entitled to get it, and none would be able to offer obstruction, and the Rani's name would as well be entered in respect of these seven *jagir* villages.

III. That I have with great exertion built a temple of Kalka Debi at Lakhna, the Rani Sahiba would be the superintendent (*mutwalli*) and in possession of the temple without being interfered with by any one, but the *charhawa* (offerings) income of the said temple would be used in the work of the temple, such as the improvement of buildings, etc., according to her wish, just as I have up to date done, and out of the income of the temple, it would never be legal to bring any portion whatever of the income to her personal use.

IV. I have built a temple known as *Chatri* in Lakhna in honour of my deceased father, Khuman Singh, and the *haveli* now occupied by the Rani Sahiba appertains to it. That *Chatri*

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and *hareli* are from before under the management and superintendence of Rani Kishori, it would as heretofore remain in her possession and management as *mutwalli*. Be it known that Thakurain Adhar Kunwar having fixed and assigned the *malikana* of Dhanna, etc., at Rs. 1,249-11-0 for the expenses of *Chatri*, etc., had got mutation effected in favour of the Rani Sahiba; but that amount appearing insufficient to meet the expenses relating to *bhog* (charity), pay of *Pujaris*, peons and other servants of the *Chatri* and for education of Brahman youths, and the amount of *malikana* allowance having been decreased in the recent settlement, since then out of the *jagir* income of Lakhna, etc.—five villages, Rs. 10 per day, I have further allowed for the expenses of *Chatri*, that the Rani Sahiba should as usual continue to pay the *malikana* of Dhanna, etc., and Rs. 10 from the income of five *jagir* villages, and that money should be spent in the aforesaid work of that *Chatri* and in preparation of goods and furniture that may add lustre to the *Chatri*.

V. Generally the rights of my servants, friends and dependents that are now fixed, they are binding upon the Rani Sahiba subject to the conditions and incidents with which they were fixed. As the daughter has not yet been married, the Rani Sahiba is bound to prove her generous and charitable spirit in this ceremony and do not give less than Rs. 50,000. Thakurain Adhar Kunwar Sahiba is the head member of my family, and the Rani Sahiba is, by reason of her being young, bound to pay respects due to her old age and attend upon and render service to her. She would continue to pay Rs. 50 per month to the married wife of Lal Balwant Singh.

VI. That from this date up to 16 years, i.e., when Lal Balwant Singh's age, which is now 34 years, reaches to that of 50, any male issue be born by married wife, he would be entitled to that property on attaining majority, and the Rani Sahiba would be bound to retain proprietary possession until he attains majority and deliver the property to him on his attaining majority. If up to this period no male issue be born to Lal Balwant Singh, without waiting for the birth of an issue to him, the Rani Sahiba would have the power to appoint owner and representative and heir of the property either Maha Lakshmi Bai, daughter, who is now 7 years old, or her male issue if one be born to her, subject to this

condition that the said daughter and her son take up their permanent residence at Lakhna. If both of these opportunities are not available, the Rani Sahiba is entitled to adopt and appoint him representative and owner of the *riasat* and property aforesaid, a male issue of Chaudhri Bhup Singh, resident of Mehdipur, who may be considered by the Rani Sahiba competent and fit, and in the three cases the Rani Sahiba would be entitled to impose any condition or conditions which she thinks necessary in regard to manner of succession and possession of property.

VII. If a son be born to Lal Balwant Singh by the married wife after the expiry of the fiftieth year of his age he would even then be entitled to the property after attaining his majority. Therefore the said property should remain either in the possession of the Rani Sahiba or in that of the daughter, daughter's son or adopted son, whomsoever Rani Sahiba might have appointed as representative up to the time that boy of Lal Balwant Singh does not attain the age of 18, and then he would be the owner and hold possession of the property, and from whose possession the son of Lal Balwant Singh obtains the property, he would pay that person Rs. 100 per month.

VIII. If by chance, before the son of Lal Balwant Singh attains majority, and an issue being born, or before the expiry of 50 years of his age, or in case of no issue being born, the Rani Sahiba dies, the said property should devolve on Maha Lakshmi Bai or on her son, if alive, and he would remain in possession until a son is born to Lal Balwant Singh by the married wife and attains majority, i.e., he would obtain possession when 18 years old, and the person formerly in possession should get Rs. 100 per month.

IX. Lal Balwant Singh personally has been excluded from inheritance since August, 1872; he has no power and authority to interfere with the proprietary possession and future powers of the Rani Sahiba; but if Lal Balwant Singh after his release adopts an approved and grave course and remains obedient and in the service of Rani Sahiba as a son, adopting such a mode of life which Rani Sahiba may approve, he would besides Rs. 50 per month allowed to his married wife under paragraph V of this deed of gift, get Rs. 100 per month from the Rani Sahiba for his personal expenses, and this

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pay is not based on any title nor would Lal Balwant Singh be able to claim it; nay, its continuance would depend at the pleasure of Rani Sahiba.

X. This deed of gift would, subject to all the terms, be held enforceable from this date; but, subject to the condition that, in case the Rani Sahiba dies before me, the entire subject of gift property would revert to me, and the deed of gift, together with all the terms, would be cancelled.

XI. The Rani Sahiba has started a money-lending and *sarrafi* firm in the name of Sri Gobindji and Rani Kishori at Lakhna with her *stridhan*, and the deeds relating to debts appertaining to the firm and mortgage deeds and property, which she has contained in her name, I have nothing whatever to do with the business, etc., appertaining to it; they are her special property, and the deed of gift or any of its terms do not at present or for the future affect the same."

After a very careful examination of the able arguments urged before them, their Lordships are of opinion that there are insuperable difficulties in the way of holding that the estate taken by the Rani was limited, as contended for the plaintiff. According to the recitals, the settlor's object was to disinherit his son Balwant, and this purpose was effected by giving the estate to the Rani so that it was no longer descendible to the heirs of the settlor.

After reciting that the settlor had been compelled to exclude Balwant Singh from the right of representing him and from inheritance, and that for the purpose of maintaining the name and protecting the property it was necessary that there should be some representative (literally some one to stand in his place), and that there was none but Rani Kishori, the deed goes on, " I have therefore made a gift in favour of Rani Kishori of all my moveable and immoveable properties . . . and appoint her my successor and representative subject to the following conditions." Under condition I the villages were to be "owned by the Rani Sahiba just as I owned,"

and complete possession was to be given her. Similarly as to the 10 per cent. on the revenue of seven villages, condition II provides that, after the settlor's death, "the Rani Sahiba would be entitled to get it and none would be able to offer obstruction."

In their Lordships' opinion there is nothing so far in the deed to cut down the gift or prevent the Rani from taking such an estate in the properties, which are the subject of the gift, as a wife takes in immoveable property given her by her husband. According to the Hindu law, such property is taken by her as *stridhan* and is descendible to her heirs and not to his, and would devolve first on her daughter and her daughter's daughter and failing them on her daughter's son, thus effectually excluding Balwant; but over such property, it is stated by Mr. Mayne, paragraph 664, she would have no right of alienation unless the gift was coupled with an express power of alienation, or, as has been held by this Board, unless there are words of sufficient amplitude to confer it upon her. Some reliance has been placed on the fact that there is no mention of the donee's heirs such as is generally found where it is intended to create an estate of inheritance, but condition VI, which has been so much discussed, shows clearly that it was the settlor's intention to establish a line of succession that would exclude Balwant.

Condition VI provides that if a son is born to Balwant Singh within the next 16 years—in other words, before he attains the age of 50—such son is to take the property on his attaining majority, and the Rani is bound to retain "the proprietary possession" until he does attain majority. If, however, no son is born to Balwant before he attains the age of 50, she is not to be bound to retain the proprietary possession herself, but is expressly empowered to give or bequeath it to her daughter or

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her daughter's son, " *to appoint owner and representative and heir* " her daughter—the second defendant—or her daughter's son if she have one, and failing them to make an adoption, and in regard to all three cases she is empowered " to impose any condition or conditions which she thinks necessary in regard to manner of succession and possession of property." These provisions, which are only material in so far as they show the intention of the settlor, in their Lordships' opinion, clearly show that it was the intention of the settlor that she should not only have the estate, which under Hindu law a woman has in property given her by her husband, but should also have power to alienate it to her daughter or her daughter's son, thus enabling her, it may be observed, to prefer the daughter's son to the daughter's daughter, who would be a preferential heir to her *stridhan*. The effect was, whilst leaving the property to descend as *stridhan* and so exclude Balwant Singh, to enable the Rani to transfer it as she was expected to do, to the daughter's son if there was one, because according to Hindu religious ideas a daughter's son stands in the place of a son and like a son is *putrika*, or a liberator from *put*. It was only failing them that she was to have power to adopt, and in all cases she was to have power to impose conditions of succession. These provisions, in their Lordships' opinion, make it clear that it was intended to give her a woman's estate enlarged by the powers of alienation to her daughter and daughter's son, already specified, and that, in default of the exercise of these powers, it was to descend to her heirs.

Condition VII then deals with the birth of a son to Balwant Singh after he had attained the age of 50, when the widow might have transferred the estate to her daughter and her daughter's son or to an adopted son under condition VI, and provides that she or her

transferee should retain the property until Balwant's son attained his majority and hand it over then. Further, it provides that, on succeeding to the property, Balwant's son should be bound to pay Rs. 100 a month to the person from whom he obtained it, an obligation by which the plaintiff would not be bound if it were held that he was entitled to succeed, not under the deed, but as heir of the settlor.

Then comes condition VIII, which, as translated, is not very clearly worded, but provides for what is to happen in case of the Rani dying before Balwant Singh had attained the age of 50 in case a son had been born to him but had not attained majority, or in case no son had been born to him. In either event the Rani's powers of disposition under condition VI would not have come into operation, and, accordingly, the settlor himself provides that in these events the property is to "devolve on Maha Lakshmi Bai or son if alive," who should remain in possession until a son was born to Balwant Singh and attained majority, in which case he would take, and the person on whom the property had devolved would be entitled to receive Rs. 100 a month.

These provisions for events which have not happened, in their Lordships' opinion, were intended by the settlor to effectuate his declared object of disinheriting his son Balwant and preventing him from claiming to come in as heir on the death of the Rani.

The same intention is clearly expressed in condition IX, which, whilst making some provision for Balwant Singh, recites that he personally had been excluded from the succession and had no power or authority to interfere with the property, possession and future powers of the Rani.

Condition X contains an additional condition of defeasance in the event of the Rani predeceasing the settlor, when the property would revert to the settlor. This

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clause, which was no doubt intended to enable the settlor to make a fresh settlement, does not appear to throw any light on the present question.

In their Lordships' opinion the testator's intention clearly was that the property should pass to the Rani and her successors under the deed to the exclusion of the settlor's heir, unless a son was born to Balwant and attained majority. In that event Balwant's son was to come in and take the estate under the deed, and not as the settlor's heir on the suggested intestacy arising from the failure of the gift over to him, following the determination of the estate limited to the Rani and her successors until Balwant's son should attain majority.

Two intentions appear clearly in the deed, one to exclude Balwant altogether from inheritance, the other to bring in his son on his attaining majority. Both intentions are effectuated under the deed by holding that the Rani and her successors took an estate subject to defeasance on the happening of a certain event, the attainment of majority by a son of Balwant. On the other hand, the construction contended for on behalf of the plaintiff would defeat the settlor's intention by letting in Balwant as the settlor's heir if he was alive, as he very well might have been, when the plaintiff attained majority. For these reasons their Lordships are of opinion that the provisions in the unborn son's favour amount to a condition subsequent, and it is a well-settled principle of law, which has now been embodied in sections 28 and 30 of the Indian Transfer of Property Act, 1882, that in such a case " if the ulterior disposition is not valid the prior disposition is not affected by it."

Their Lordships are, therefore, unable to agree with the learned Judges of the High Court " that the Rani was left as a custodian of the property until its final devolution to a full owner." The Rani and her successors

were put in, not merely as custodians until the attainment of majority of Balwant's son, an event which might never happen, but also to effect the disherison of Balwant himself by leaving the property away from the settlor's natural heirs. In their Lordships' opinion, the terms of the deed clearly show that they were given an estate which was not limited but absolute, in point of duration, and subject only to defeasance in case of Balwant having a son who attained majority or the Rani dying before the settlor. The learned Judges also held that there was a cesser of the Rani's estate "on the attainment of 18 years by the appellant, and not on the appellant being capable of taking possession of the property," citing *Doe dem Blomfield* v. *Eyre* (1), a judgement of the Court of Exchequer Chamber. That was the case of a gift to *A.B.* for life with a gift over which failed, and what was held was that it was clearly not the intention of the settlor that the heirs of the first donee should take in preference to the heirs of the settlor. In the present case the intention was wholly to exclude the heirs of the settlor as such as a means of keeping out his unworthy son, and, in their Lordships' opinion, it is not open to the court to adopt a construction which lets them in.

For these reasons their Lordships are of opinion that the decree of the High Court confirming the decree of the lower court, and dismissing the suit, was correct, and that this appeal fails and must be dismissed with costs. The costs of the remand to the High Court must also be paid by the appellant. They will humbly advise His Majesty accordingly.

Solicitors for the appellant: *Douglas Grant* and *Dold.*

Solicitor for the respondent: *H. S. L. Polak.*

(1) (1848) 5 C.B., 713.

APPELLATE CIVIL.

Before Mr. Justice Ashworth and Mr. Justice Iqbal Ahmad.

1927 *June*, 6.

BALMUKAND AND ANOTHER (PLAINTIFFS) *v.* TULA RAM AND OTHERS (DEFENDANTS).*

Act No. IV of 1882 *(Transfer of Property Act), section* 6—*Offerings at a temple—Right to receive, transferable—"Property"—"Mere possibility".*

Although the right to receive the emoluments attached to a priestly office is not, in the absence of a custom or usage to the contrary, ordinarily transferable, when the right to receive offerings made at a temple is independent of an obligation to render services involving qualifications of a personal nature. such as officiating at the worship, there is no justification for holding that such a right is not transferable. *Mancharam* v. *Pranshankar* (1), *Rajah Vurmah Valia* v. *Ravi Vurmah Mutha* (2), *Durga Bibi* v. *Chanchal Ram* (3) and *Srimati Mallika Dasi* v. *Ratanmani Chakarvarti* (4), referred to. *Paragi* v. *Gauri Shankar* (5), distinguished. *Puncha Thakur* v. *Bindeswari Thakur* (6) and *Sukh Lal* v. *Bishambhar* (7), dissented from. *Ahmad-ud-din* v. *Ilahi Bakhsh* (8), followed.

THIS was a plaintiffs' appeal arising out of a suit brought to recover a sum of money alleged to be due to the plaintiffs on a *theka* given by them to the defendants for the collection of offerings to a certain deity installed in a temple, and for the cancellation of that *theka*, and for a perpetual injunction restraining the defendants from interfering with the plaintiffs' right of making the collections themselves.

The deity in question was installed by one Asa Ram, and Asa Ram and his descendants received the offerings made to the deity by devotees resorting to the

* Second Appeal No. 953 of 1925, from a decree of A. G. P. Pullan, District Judge of Moradabad, dated the 8th of April, 1925, confirming a decree of Ganga Nath, Subordinate Judge of Moradabad, dated the 9th of August, 1923.

(1) (1882) I.L.R., 6 Bom., 298.
(2) (1876) 4 I.A., 76.
(3) (1881) I.L.R., 4 All., 81.
(4) (1897) 1 C.W.N., 493.
(5) (1918) 51 Indian Cases, 86.
(6) (1915) I.L.R., 43 Calc., 28, and (1916) 37 Indian Cases, 960.
(7) (1916) I.L.R., 39 All., 196.
(8) (1912) I.L.R., 34 All., 465.

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temple. One of the descendants of Asa Ram mortgaged his right to receive a share of the offerings to Dwarka Das, father of the plaintiffs appellants, prior to the year 1874. Dwarka Das put that mortgage into suit and obtained a decree for sale on the 16th of June, 1874. When Dwarka Das proceeded to execute the decree the judgement-debtor objected to the execution on the ground that the offerings made at the temple were *waqf* and were not saleable in execution of the decree. That objection was disallowed by the court on the 13th of May, 1879, and it was held in that case that the property in question was not *waqf* property and was saleable in execution of the decree. This order of the execution court was upheld on appeal, on the 5th of December, 1879. A similar objection was preferred by some relation of the judgement-debtor to the execution of the decree and that was also disallowed by the court on the 13th of May, 1879. The right to receive a share of the offerings was eventually sold in execution of the decree obtained by Dwarka Das and was purchased by him. The judgement-debtor again objected to the sale on the ground *inter alia* that the offerings made at the temple were not saleable in execution of the decree, but the objection was overruled.

Thereafter in the year 1895 a suit was brought by some of the descendants of Asa Ram for a declaration that Dwarka Das had not acquired any right, by virtue of the auction-purchase made by him, to receive a share of the offerings made to the deity, and for an injunction restraining Dwarka Das from receiving the same. It was alleged in that suit that the male descendants of Asa Ram always served the deity and managed the affairs of the temple; that no one else had a right to worship in that temple or receive the offerings made to the deity, that the right to receive the offerings was not transferable, and that Dwarka Das acquired no right by

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the purchase made by him in execution of the decree of 1874. Dwarka Das contested that suit and one of the issues raised in the case was whether the offerings were dedicated for any charitable purposes and whether they were transferable. The finding of the court on that issue was as follows:—

"There is overwhelming documentary evidence to show that the co-sharers always treated the property as their exclusive property and mortgaged and sold it to the extent of their shares and thereby outsiders were induced to deal with the property."

On this finding the plaintiffs' suit was dismissed. The unsuccessful plaintiffs appealed against the decree of the trial court and their appeal was dismissed on the 6th of December, 1899. The learned Judge of the appellate court made the following observations in the course of his judgement:—

"I agree with the Munsif that the offerings in dispute or the right to receive them cannot be treated as trust property. . . . Moreover it is well proved that the offerings have always been dealt with as absolute property of the members in possession, being transferred from time to time."

It further appeared that a suit had been brought by one of the present plaintiffs, for the recovery of money, on the basis of a *qabuliat* executed prior to the *qabuliat* in dispute in the present litigation, and was decreed *ex parte* against defendants Nos. 1 and 3 on the 19th of January, 1915.

It was also in evidence that the present plaintiffs had brought a suit on the basis of the *qabuliat* and the lease now in dispute for recovery of the *theka* money against defendants Nos. 1 and 3 and that that suit was decreed *ex parte* on the 21st of March, 1921, and the appellants contended that the *ex parte* decree obtained by the plaintiffs barred the defence now raised by the defendants in the suit giving rise to the present appeal.

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On this appeal—

Babu *Piari Lal Banerji* and Munshi *Shabd Saran*, for the appellants.

Munshi *Narain Prasad Ashthana*, for the respondents.

THE judgement of the Court (ASHWORTH and IQBAL AHMAD, JJ.), after setting out the facts as above, thus continued :—

The learned counsel for the respondents argues that the cause of action for the present suit being different from the cause of action on which the former suit was based, section 11 of the Code of Civil Procedure does not apply and, further, that the question whether the right to collect the offering is or is not transferable, being a question of law, the former decision cannot operate as *res judicata* in the present suit. He also points out that only defendants Nos. 1 and 3 of the present suit were defendants in the suit that was decreed *ex parte* in March, 1921, and the remaining two defendants of the present suit not being parties to that litigation are not bound by the decree in that suit.

If the managing member of the joint family consisting of the four defendants was a defendant in the former suit he would be deemed, in the absence of evidence to the contrary, to have been sued in a representative capacity, and the decree obtained against him would be binding on all the members of the family. However, there is nothing in this case to show whether the managing member of the family of the defendants was or was not a defendant in the former suit, and, therefore, it may be that the decree in that suit is not binding on defendants Nos. 2 and 4 of the present suit. But in our judgement defendants Nos. 1 and 3 are now barred from contesting the plaintiffs' suit on the ground that the right to collect the offerings made to the deity are not transferable. It was open to these defendants to

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contest the former suit on the ground that the offerings were not transferable, and they having failed to make this matter a ground of defence in that suit are now barred from raising that plea. As already stated, the former suit was based on the very *qabuliat* and the lease on the basis of which the present suit was brought, and the mere fact that the present suit is for years different from the year for which the former suit was brought, does not entitle defendants Nos. 1 and 3 to contest the present suit on a ground on which they could have contested the former suit but failed to do so. The plaintiffs could only be held entitled to a decree in the former suit if the right to collect the offerings was a transferable right and, therefore, the question of the transferability or otherwise of the right to receive the offerings was a matter directly and substantially in issue in the former suit. It is clear that the plaintiffs and defendants Nos. 1 to 3 were, and are, litigating under the same title in the former and in the present suit, and the court that decided the former suit was competent to try the present suit and, therefore, the case comes within the purview of section 11 of the Code of Civil Procedure. The question whether or not the right to collect the offerings made to the deity installed in the temple in question is transferable is not a pure question of law. In our judgement the answer to the question must in every case depend on a variety of circumstances which can only be proved by evidence. However, we need not pursue this matter further, as in our judgement the plaintiffs are entitled to succeed on the other grounds urged on their behalf.

Before proceeding to deal with the third point argued by the learned counsel for the appellants we may note that the learned counsel for the respondents did not challenge the title of the plaintiffs respondents as auction-purchasers and did not support the decree of the courts

below on the ground that the sale in favour of the plaintiffs was void, and, therefore, we are not called upon to deal with the second point argued on behalf of the appellants.

It now remains to consider whether or not the courts below were right in holding that the right to collect the offerings made at the temple in question was not transferable. We are unable to subscribe to the broad proposition laid down by the courts below that in no case the offerings made to a deity installed in a temple are transferable.

A distinction must be drawn between cases in which emoluments are attached to a priestly office, and the cases in which the offerings are made to a deity and the persons who receive the same have not to render services of a personal nature as a consideration for the receipt of the offerings. The emoluments of the former kind are not, in the absence of a custom or usage to the contrary, ordinarily transferable, for the simple reason that they are inseparably connected with a priestly office and it is contrary to public policy to allow such offices to be transferred to a person not competent to perform the worship, either by private sale or by sale in execution of a decree. As has been pointed out in *Mancharam* v. *Pranshankar* (1) :—

"If such property were subject to attachment and sale, the purchaser might be a Muhammadan or a Christian, who would be both unwilling and incompetent to perform the service of the idol, and in the case of *Dubo Misser* v. *Srinibas Misser* (2), Mr. Justice MITTER further observed that he might be unfit to prepare food for the idol . . . Such an alienation to an improper person would defeat the object of the endowment and in some cases . . . it might be inconsistent with the presumed intention of the founder of the endowment."

As the right to receive the offerings cannot be separated from the duty of officiating at the worship

(1) (1882) I.L.R,. 6 Bom., 298. (2) 15 W.R., C.R., 409.

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the law disfavours the transfer of such emoluments, *vide* the cases of *Rajah Vurmah Valia* v. *Ravi Vurmah Mutha* (1), *Durga Bibi* v. *Chanchal Ram* (2) and *Srimati Mallika Dasi* v. *Ratanmani Chakarvarti* (3).

But when the right to receive the offerings made at a temple is independent of an obligation to render services involving qualifications of a personal nature, such as officiating at the worship, we are unable to discover any justification for holding that such a right is not transferable. That the right to receive the offerings, when made, is a valuable right and is property, admits of no doubt and, therefore, that right must, in view of the provisions of section 6 of the Transfer of Property Act, be held to be transferable, unless its transfer is prohibited by the Transfer of Property Act or any other law for the time being in force. It is maintained by the learned counsel for the respondents that the right to receive the offerings is a "mere possibility" of the nature contemplated by clause (*a*) of section 6 of the Transfer of Property Act and, therefore, is not transferable, and, further, that a transfer of the right to receive offerings made at a temple is void as being against public policy. The learned counsel has relied on the cases of *Puncha Thakur* v. *Bindeswari Thakur* (4) and *Puncha Thakur* v. *Bindeswari Thakur* (5) and *Paragi* v. *Gauri Shanker* (6). The last-mentioned case is distinguishable. In that case the subject of the transfer was the right to receive gifts made by the worshippers at the temple to the officiating priest. In short, the right to receive the gift in that case was a right annexed to the office of the officiating priest and, therefore, the case came within the purview of the principle laid down in the cases noted above in which it was held that when

(1) (1876) 4 I.A., 76.
(2) (1881) I.L.R., 4 All., 81.
(3) (1897) 1 C.W.N., 493.
(4) (1915) I.L.R., 43 Calc., 28.
(5) (1916) 37 Indian Cases, 960.
(6) (1918) 51 Indian Cases, 86.

the emolument is attached to a priestly office it is not transferable.

The case of *Puncha Thakur* v. *Bindeswari Thakur* (1) undoubtedly supports the contention of the learned counsel for the respondents. In that case it was held that a right to receive offerings from pilgrims resorting to a temple or shrine is inalienable because "the chance that future worshippers will give offerings is a mere possibility and as such it cannot be transferred." If the learned Judges intended to hold that even if the right to receive the offerings is dissociated from a priestly office or from an obligation to render services involving qualifications of a personal nature, it is not transferable, we, with all respect, are unable to agree with their decision. The right to receive the offerings when made is a definite and fixed right and does not depend on any possibility of the nature referred to in section 6 (*a*) of the Transfer of Property Act. The moment the offerings are made the persons clothed with the right are entitled to appropriate the same. In short, the right to receive the offerings "is not so uncertain, variable and limited as to pass out of the conception of law." It is true that the *amount* of the offerings largely depends upon the surrounding circumstances, viz., the number of votaries, their generosity and their charitable disposition, but the fact that offerings large or small are bound to be made is a certainty and not a mere possibility of the nature referred to in section 6 (*a*) of the Transfer of Property Act and, therefore, we are unable to hold that the transfer of a right to receive the offerings is prohibited by section 6 (*a*) of the Transfer of Property Act. The view that we take is in consonance with the view taken in the case of *Ahmad-ud-din* v. *Ilahi Bakhsh* (2). In that case the validity of a gift to receive a fixed share

(1) (1915) I.L.R., 43 Calc., 28. (2) (1912) I.L.R., 34 All., 465.

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of the offerings made at a Muhammadan shrine was upheld by this Court and it was observed that—

"the thing gifted in this case must be regarded as being the right of the donor to receive a fixed share in the offerings after they have been made and this is an enforceable right in the sense that it is enforceable in law as against other co-sharers in the same."

There is no distinction between the right to collect the offerings made in a Muhammadan shrine and in a Hindu temple and if in one case it is not a mere "possibility" and the right is transferable there is no reason to hold that the right should not be transferable in the other. In the case of *Sukh Lal* v. *Bishambhar* (1) a mortgage by a Maha Brahman of his share in the *brit jajmani* (that is pecuniary interest receivable by way of voluntary donation by virtue of his right to officiate at funeral ceremonies) was upheld. Though the learned Judges in that case observed that "the offerings at a temple do not stand on the same basis as remuneration which Maha Brahmans receive for the services they perform at Hindu funerals", they did not point out the distinguishing features between the two, and we are unable to discover any. No doubt in one case as in the other, the *amount* of the remuneration or of the offerings depends on future events which may be more or less uncertain, but the right to receive the same when those events happen is a definite right. There is no uncertainty about that right. The right is exercised, in the case of a Maha Brahman, when he performs the funeral ceremonies, and in the case of a right to receive the offerings made at a temple when those offerings are made. In the last-mentioned case the contention that the right of a Maha Brahman was a mere possibility within the meaning of section 6 (*a*) of the Transfer of Property Act was repelled by the learned Judges who decided the case.

(1) (1916) I.L.R., 39 All., 196.

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The case of *Puncha Thakur* v. *Bindeswari Thakur* (1) was, on an application for review, re-opened and decided by the Patna High Court, *vide Puncha Thakur* v. *Bindeswari Thakur* (2). One of the learned Judges was a party to both the decisions. It was held in that case that a transfer of the right to receive offerings made at a temple is void as against public policy. When the right to receive the offerings is unconnected with any office, it is difficult to appreciate how a transfer of such a right offends against public policy. The right is a right to receive some property that has a marketable value and, in the absence of cogent reasons, one would suppose that the person getting such property has a right to transfer the same. If after the receipt of the property he can, without in any way violating public policy, transfer the same, what difference does it make if he transfers the right to receive the same? It is immaterial to the public at large whether the heirs of the persons who installed the deity or transferees from them take the offerings, for the obvious reason that neither from the one nor from the other they expect services in connection with the temple.

For the reasons given above we hold that the rights to receive offerings made at a temple when dissociated from priestly office are transferable. In the present case it was stated at the Bar that the descendants of Asa Ram received the offerings though they did not perform the worship of the idol nor did any other necessary functions connected with it. That being so, the contention of the defendants that the right was not transferable ought to have been overruled by the courts below.

We may further point out that in the present case the lease was in favour of the persons who themselves had the right to collect the offerings and, therefore, there was nothing against public policy in empowering

(1) (1915) I.L.R., 43 Calc., 28. (2) (1916) 37 Indian Cases, 560.

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them by the lease to collect offerings not only of their share but of the plaintiffs' share as well.

As observed above, the lower appellate court has not decided the other issues framed in the case and as the decision of the lower appellate court was on a preliminary point and we disagree with that court, the only alternative open to us is to set aside the decree of the lower appellate court and remand the case to that court with directions to re-admit the appeal to its original number and to dispose of the same after deciding the other points that call for determination in the case, and we order accordingly. We leave it open to the lower appellate court to allow or not to allow the parties to adduce additional evidence on the remaining issues. The plaintiffs are entitled to the costs of this appeal. Costs of the courts below will abide the result.

Case remanded.

Before Mr. Justice Sulaiman and Mr. Justice Banerji.

1927
July, 14.

ASHRAF BIBI (PLAINTIFF) *v.* MUHAMMAD ABDUL RAOOF AND OTHERS (DEFENDANTS).*

Act (Local) No. XI of 1922 *(Agra Pre-emption Act), section* 12, *sub-clause* (3)*—Pre-emption—Competition between sister and uncle—"The common ancestor."*

In respect of a suit for pre-emption under the Agra Pre-emption Act, 1922, and considered as heirs according to the Muhammadan law, there is no difference in degree between a sister and an uncle of the vendor; but as regards descent from the common ancestor the sister is the nearer, for "the common ancestor" must be construed as "the nearest common ancestor."

Held also, that a pre-emptor who is only of equal degree with the vendee cannot claim to have the property sold

*Second Appeal No. 1030 of 1926, from a decree of Ali Ausat, District Judge of Ghazipur, dated the 10th of March, 1926, confirming a decree of Raj Behari Lal, Subordinate Judge of Ghazipur, dated the 28th of November, 1925.

divided between himself and the vendee. *Jagrup Singh* v. *Indrasan Pande* (1) and *Ishwar Dat Upadhiya* v. *Mahesh Dat Upadhiya* (2), referred to.

THE facts of this case are fully stated in the judgement of the Court.

Babu *Piari Lal Banerji*, for the appellant.

Dr. *M. Waliullah*, for the respondents.

SULAIMAN and BANERJI, JJ. :—This is a plaintiff's appeal arising out of a suit for pre-emption. The plaintiff Musammat Ashraf Bibi is the own sister of the vendor Ali Ahmad. The defendants vendees are the own uncles of Ali Ahmad, that is, his father's brothers. The case is governed by the Agra Pre-emption Act and it is obvious that the plaintiff as well as the vendees are descendants from a common ancestor of the vendor and are within 4 degrees. The courts below have dismissed the suit. The learned Munsif held that section 12, sub-clause (3), which gives preference in cases of near relationship applied only to the case of rival pre-emptors. The lower appellate court is also of the same opinion. It has further expressed the opinion that, inasmuch as a sister is a sharer whereas uncles are only residuaries, the sister is a nearer heir.

The language of section 12, sub-clause (3) is certainly ambiguous, but it has been held by this Court in two reported cases, *Jagrup Singh* v. *Indrasan Pande* (1) and *Ishwar Dat Upadhiya* v. *Mahesh Dat Upadhiya* (2), that the expression "claiming pre-emption" is not confined to suits by rival claimants but is applicable to a vendee who puts forward his equal right of pre-emption. While following these cases we noticed that this may involve a different interpretation of the word "claiming" in section 13 (*vide* S. A. 586 of 1925, decided on the 26th of March, 1926). It must, therefore, be held that the preference is not confined to rival suits only.

(1) (1926) I.L.R., 47 All., 910. (2) (1925) I.L.R., 48 All., 347.

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Under the Muhammadan law the sister is a sharer and the uncles are residuaries, but if the vendor were to die all these three persons would be the immediate heirs and would succeed to definite portions of the estate. For purposes of calculating the shares, classes of sharers and residuaries have been constituted. But when all succeed simultaneously it is impossible to hold that the sister is a nearer heir than the uncles. Daughters and sisters are in the list of sharers, and yet they can hardly be said to be nearer heirs than sons and brothers respectively, who are not sharers but only residuaries. The word "nearer" apparently has been used to denote persons who would succeed immediately as against a person who would succeed if those other heirs also were dead. For instance, a nearer Hindu collateral would be a nearer heir than a more remote collateral. And among Muhammadans, sons and daughters would be nearer heirs than brothers and sisters. We are, therefore, unable to hold that the plaintiff is a nearer heir.

The next point urged on behalf of the appellant is that under section 13 the plaintiff should at least be given a share in the property sold. It is contended that she as well as the vendees are persons who at least claim equally, and the property ought, at any rate, to be equally divided among them. It is also contended that the word "claiming" in section 13 has been used in section 12, sub-clause (3) also, where in the cases above noted it has been given the meaning "persons having a right of pre-emption", and not necessarily persons suing for pre-emption. We did, however, point out this difficulty in the unreported case mentioned above. We do not think that we are compelled to hold that the expression "persons claiming" under section 13 includes vendees. It is abundantly clear from the provisions of sections 10 and 11 of the Act, that on a sale to any person having a right of pre-emption, no right of pre-emp-

tion accrues to any person who has an equal or inferior right of pre-emption. Section 11 confers a right of pre-emption on persons mentioned in section 12, subject to the foregoing provisions of section 10. It follows, therefore, that when a vendee is on the same footing as the pre-emptor, there is no right of pre-emption at all and the property cannot be divided between them. This is in accordance with the view which prevailed previously, before the Act was passed, and we think that the Act has not altered the law in this respect.

The appeal, however, must succeed on a ground which apparently was not pressed before the lower appellate court and is not expressly mentioned in the grounds of appeal before us. The plaintiff is the sister of the vendor and the vendees are his uncles. She is, therefore, descended from a nearer ancestor. Section 12, sub-clause (3), contains the expression "descended from *the* common ancestor" and does not speak of *a* common ancestor. If the nearest common ancestor were not meant, then it is obvious that there might be more than one ancestor from whom the claimants are descended, and are not removed by more than 4 degrees. If all such claimants were to come in one category, the proper expression to use should have been "a common ancestor". The sub-section, however, uses the words "the common ancestor", which implies that there can be only one common ancestor and not more than one. If it is intended that there can be only one common ancestor, it follows that that ancestor must be the nearest. In interpreting the sub-section in this way we are not necessarily introducing a new word "nearest" into the section but are giving due weight to the use of the definite article "the" before the words "common ancestor". The use of that article no doubt indicates that there is only one ancestor in contemplation and that must, of necessity, be the nearest. Although the language of the

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section is not happy we have, after giving the matter our best consideration, come to the conclusion that the meaning of the words "the common ancestor" must be that common ancestor who is the nearest. We might point out that in cases arising under the *wajib-ul-arz* the word "ekjaddi" was often held to mean "descended from the nearest ancestor" and that persons descended from remoter ancestors were excluded. (F. A. 358 of 1924).

It, therefore, seems that the legislature has not intended to alter the law in this respect. We accordingly allow this appeal and setting aside the decrees of the courts below decree the plaintiff's suit with costs. We give the plaintiff two months from this date for payment of the pre-emption money. If the amount is not deposited within the time fixed, the plaintiff's suit will stand dismissed with costs in all courts.

Appeal allowed.

Before Mr. Justice Mukerji and Mr. Justice Ashworth.

1927
July, 26.

NATHU RAM (DEFENDANT) *v.* CHAND KUAR (PLAINTIFF).*

Act No. XIII of 1855 *(Indian Fatal Accidents Act), section* 1*—Suit for damages—Principle of assessment of damages.*

The defendant to a suit for damages on account of his having caused the death of the plaintiff's husband, had already been convicted in respect thereof under section 304 of the Indian Penal Code, and had been fined Rs. 1,000, which were given to the widow by way of compensation.

Held, that this sum must be taken into account in assessing the damages which should be given in the civil suit.

Principles on which damages should be assessed in a case under the Fatal Accidents Act, 1855, discussed. *Rowley* v. *London and North-Western Railway* (1), followed.

* First Appeal No. 204 of 1925, from a decree of Kashi Prasad, Subordinate Judge of Agra, dated the 26th of January, 1925.

(1) (1873) 42 L.J., Ex., 153.

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THE facts of this case sufficiently appear from the judgement of the Court.

Munshi *Baleshwari Prasad*, for the appellant.

The respondent was not represented.

ASHWORTH, J. :—This appeal arises out of a suit brought by the widow of a deceased man against the defendant, a zamindar who caused his death by shooting him. The suit is for damages under the Fatal Accidents Act (XIII of 1855). The zamindar was convicted of an offence under section 304 and sentenced to imprisonment, and to a fine of Rs. 1,000. The fine was realized and was paid over to the present plaintiff. Not being satisfied with the amount, she has brought this suit and has obtained a decree for the further sum of Rs. 1,500. The defendant appeals. The respondent is not represented. The lower court awarded the further sum of Rs. 1,500, taking into consideration the fact that Rs. 1,000 had already been awarded.

The first question that arises in this appeal is whether the Rs. 1,000 fine paid over to the plaintiff should be taken into account in the present suit. No authority, one way or the other, has been cited, but the Act empowers the civil court "to give such damages as it may think proportionate to the loss resulting from such death to the party for whom and for whose benefit the action shall be brought."

These words appear to me to require that the fine already realized should be taken into account. The death of the husband was the cause of the fine being realized and given to the plaintiff. Any damages given to the plaintiff by reason of loss must take into account any pecuniary advantage obtained by the plaintiff by reason of the death.

The remaining question is whether the lower court has over-estimated the damages. It is clear and settled

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Ashworth, J.

by authority that no sentimental considerations are relevant. The plaintiff cannot get higher damages even if her husband was brutally murdered by the defendant than if the death of her husband had been due merely to an error of judgement such as may, on the part of the driver of a vehicle, cause the death of a person.

The method adopted by the trial court for assessing the damages is as follows :—The sole source of income of the deceased appears to have been the cultivation of an occupancy holding which he cultivated by his own personal labour. The lower appellate court has held that the damages should be assessed according to the sum required to furnish the widow with substituted labour for working the holding. The appellant does not complain as to this method, and the respondent not being present, must also be held to acquiesce in this method. What the appellant complains of is that an error has been committed by the lower court in working out the method. The court has estimated the monthly expenditure required to furnish the labour for working the holding at from Rs. 10 to Rs. 12 a month and has awarded a sum which, if invested in Government securities, will be sufficient to produce Rs. 10 a month. It is objected that the deceased was 56 years old at the time of his death and would not have been capable of working the holding for more than, at the very utmost, ten years. This appears to me to be a just contention. The sum awarded by the lower court, however, not only will enable the widow to hire the necessary labour for ten years but will leave her at the end of that time with a sum of Rs. 1,500, which she would not have possessed at the end of ten years if her husband had survived. This objection is, in my opinion, obviously common sense. The principle underlying the objection has been approved by an English decision under Lord Campbell's Act (which is practically the same as the Indian Act).

In *Rowley* v. *London and North-Western Railway* (1) it was held that a jury might estimate the damages to an annuitant of the deceased by calculating what sum would buy him an equally good annuity, but it was added that it was material to know the average duration of the life of the annuitant. Similarly, in this case where we know the probable duration of the capacity of the deceased to supply the labour for the occupancy holding, we must take that duration into consideration.

I am not disposed to hold that the method employed by the lower court, if properly applied, was an incorrect method. There is no contention in this appeal before us that it is incorrect. There are no facts clearly set forth in the judgement of the lower appellate court which would enable this Court in appeal to assess the damages under any alternative method. It appears, therefore, that we should accept this method but correct the application of it. Rupees 12 a month comes to Rs. 144 per year. Assuming that the deceased might have worked for ten years (an exceedingly favourable estimate to the plaintiff), a total sum of Rs. 1,440 would supply that labour. But this sum would not have to be expended at once. It would only be expended at the rate of Rs. 12 per month. All the ten years the widow would be enjoying interest on the diminishing capital sum. If, therefore, we substitute, for a sum required when invested in Government securities to bring in Rs. 12 per month, a capital sum of Rs. 1,440, the decision will err, if at all, in being too generous to the widow. The appellant, however, has not suggested what deduction should be made as a set-off as against this interest, and it is not necessary in a case of this nature to calculate the damages with meticulous accuracy. I am of the opinion that a sum of Rs. 1,500 will be amply sufficient to make the damages proportionate to the loss resulting from the death of the plaintiff's husband. Rupees 1,000,

(1) (1873) 42 L.J., Ex., 153.

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as already stated, must be deducted and this will leave a sum of Rs. 500. I would, therefore, vary the finding of the lower court by reducing the sum of Rs. 1,500 to one of Rs. 500. The parties in both courts will get proportionate costs according to their success and failure.

MUKERJI, J. :— I agree.

BY THE COURT. :—The appeal is allowed in part. The decree of the court below is modified and the decree in favour of the respondent is reduced to the sum of Rs. 500. The parties will receive and pay their costs in proportion to their respective success and failure throughout.

Decree modified.

REVISIONAL CRIMINAL.

Before Mr. Justice Iqbal Ahmad.

1927
August, 3.

EMPEROR *v.* DARAB AND OTHERS.*

Act No. III of 1867 *(Public Gambling Act), sections* 3 *and* 4*—Accused charged under different sections but offences committed in course of same transaction—Joint trial—Criminal Procedure Code, section* 239 *(d).*

There is nothing to prevent persons charged with offences under sections 3 and 4 of the Public Gambling Act, 1867, being tried jointly with persons charged only with offences under section 4, provided that all the offences were committed in the course of the same transaction. *Makhan* v. *Emperor* (1) and *Emperor* v. *Fazal Din* (2), dissented from.

THE facts of this case sufficiently appear from the judgement of the Court.

Mr. *P. N. Sapru*, for the applicants.

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

*Criminal Revision No. 394 of 1927, from an order of Raghunath Prasad, Sessions Judge of Meerut, dated the 18th of May, 1927.

(1) (1909) 5 Indian Cases, 720. (2) (1914) 27 Indian Cases, 844.

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IQBAL AHMAD, J. :—Darab and Taqi applicants were charged with offences punishable under sections 3 and 4 of the Gambling Act and were tried jointly with the other applicants who were charged under section 4 of the Act. The learned Magistrate found Darab and Taqi guilty under both the sections and the remaining applicants under section 4. He ordered Noor Ahmad to execute a bond for Rs. 50 and to provide a surety in the sum of Rs. 50 to appear and receive sentence when called upon during the period of three months, and in the meanwhile to keep the peace and be of good behaviour. He sentenced Darab to three months' rigorous imprisonment and a fine of Rs. 200, and he fined the other applicants. The learned Sessions Judge on appeal has affirmed the conviction and the sentences passed by the learned Magistrate.

It appears that, on the basis of certain information supplied to it, the police obtained a warrant for the search of the house of Darab and Taqi applicants and, in accordance with that warrant, raided their house on the 26th of March, 1927. It has been held by both the courts below that the search warrant was illegal and, therefore, the courts below have rightly held that no presumption under section 6 of the Act arose that the house was a common gaming house, or the persons present in the house were there for the purpose of gaming. But the courts below, on a consideration of the materials upon the record, have come to the conclusion that the case against each of the applicants was satisfactorily proved. With this finding I cannot interfere in the exercise of my revisional jurisdiction.

It is argued that Darab and Taqi could not be jointly tried with the other applicants inasmuch as Darab and Taqi were charged not only with the offence punishable under section 4 of the Act but also with the offence punishable under section 3 of the Act, and the other applicants

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were not charged under that section. I am unable to agree with this contention. It is true that Darab and Taqi were charged with an offence different from the offence with which the other accused were charged, but the offences alleged to have been committed by all the applicants were committed in the course of the same transaction, viz., in the course of gaming and, therefore, in view of the provisions of clause (*d*) of section 239 of the Code of Criminal Procedure all the applicants could be jointly tried. In support of his contention the learned counsel for the applicants has relied on the cases of *Makhan* v. *Emperor* (1) and *Emperor* v. *Fazal Din* (2). With all respect I am unable to agree with those decisions. No reason has been assigned by the learned Judge who decided those cases for holding that the offence of keeping a common gaming house and the offence of gaming cannot be committed in the course of the same transaction.

In my judgement the decision of the courts below is perfectly correct and I dismiss this application.

Application dismissed.

Before Mr. Justice Iqbal Ahmad.

1927
August, 4.

HAFIZ-UD-DIN *v.* LABORDE.*

Criminal Procedure Code, sections 144 *and* 561*A—Emergency order—Wrongful use of section to procure the delivery of property by the person in possession to the claimant.*

Section 144 of the Code of Criminal Procedure cannot legally be used simply to procure the transfer of property and documents from the person in possession to the claimant because, in the opinion of the court, the claimant is entitled to their possession and when, as a matter of fact, it has been so used, section 561A of the Code enables the court, if it so thinks fit, to direct that the property and documents in ques-

*Criminal Reference No. 369 of 1927.

(1) (1909) 5 Indian Cases, 720. (2) (1914) 27 Indian Cases, 844.

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tion be retransferred. *Bhaganathi Servai* v. *Valayee* (1) and *Chandra Nath Mukerji* v. *Emperor* (2), referred to.

THIS was a reference from the Sessions Judge of Meerut under section 438 of the Code of Criminal Procedure, recommending that an order passed by a Sub-Divisional Magistrate under section 144 of the Code directing Hafiz-ud-din, applicant, to deliver the register and the goods of the Asiatic Petroleum Co., opposite party, that were in his possession, to the latter, be set aside and that the opposite party be ordered to hand back the register and the goods to the applicant.

The facts that led to the present reference were as follows:—The applicant was for some time the agent of the Asiatic Petroleum Co., but his agency was terminated. Notwithstanding the termination of his agency, he refused to deliver back the register and goods of the Company. The opposite party then filed an application, under section 144 of the Code of Criminal Procedure, praying that the applicant be directed to deliver to the opposite party the register and goods in his possession. The learned Magistrate, after recording the statement of the opposite party's attorney, issued an order under section 144, directing the applicant to deliver all the things belonging to the Company that were in his possession to the attorney of the Company. The applicant was also required to show cause if he was dissatisfied with the order. The applicant challenged the order of the learned Magistrate on the ground that the order did not come within the purview of section 144 and was, therefore, not warranted by law. His contention did not find favour with the learned Magistrate and, accordingly, he made his previous order absolute.

The applicant filed an application in revision against the order of the learned Magistrate in the Court of the Sessions Judge, who made the present reference.

(1) (1916) 33 Indian Cases, 830. (2) (1918) 47 Indian Cases, 803.

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Mr. *Syed Muhammad Husain*, for the applicant.

Munshi *Hazari Lal Kapur*, for the opposite party.

The Assistant Government Advocate (Dr. *M. Wallí-ullah*), for the Crown.

THE judgement of the Court (IQBAL AHMAD, J.), after setting out the facts as above, thus continued :—

In my judgement the order of the learned Magistrate cannot be supported and ought to be set aside.

As is clear from the language of section 144, action under that section can only be taken when "immediate prevention or speedy remedy is desirable" with a view "to prevent obstruction, annoyance or injury. . . . to any person lawfully employed or danger to human life, health or safety or a disturbance of the public tranquillity or a riot or an affray". In short, proceedings under the section may be taken only in *urgent* cases of nuisance or apprehended danger, and the existence of these circumstances is a condition precedent to an action under the section. It is the urgency of the case that vests the Magistrate with jurisdiction to exercise the extraordinary powers conferred by the section. It is further incumbent on the Magistrate to state in his order the materials upon which his opinion as regards the existence of an emergency is based. It is further provided that the order passed under the section is to remain in force only for a period of two months from the making thereof, unless the Local Government, by notification in the official Gazette, otherwise directs. These provisions show that the scope of the section is very limited, and the powers vested in the Magistrate by that section ought to be sparingly exercised, and proceedings under the section should not be taken unless all the requirements of the section are strictly complied with. The section was never intended to vest a Magistrate with powers to decide disputes of a civil nature between private individuals and to usurp the

functions of a civil court. Civil courts and civil courts alone have been vested by the legislature with jurisdiction to decide disputes of a civil nature between private individuals and it is not permissible for a Magistrate, under the cover of an order under section 144, to dispossess a particular individual from certain property and to direct delivery of possession of that property by an order under section 144, when the object of the order is not to prevent obstruction, annoyance or injury, etc., "to any person lawfully employed".

In the present case it appears from the record that the applicant refused to deliver the goods of the Company in his possession till such time as his account was not settled with the Company in respect of the security given by him. This being so, the dispute between the parties was purely of a civil nature which was not within the competence of the Magistrate to decide. As pointed out by the learned Sessions Judge, the learned Magistrate has nowhere found that there was any necessity of an "immediate prevention or speedy remedy". The learned Magistrate based his order on the fact that there was an apprehended injury to the public, inasmuch as the retention of the goods of the Company by the applicant was calculated to cut short the supply of petrol, and this was likely to cause serious injury and annoyance to the public. The learned Magistrate nowhere says that there was any apprehended injury or nuisance to a "person lawfully employed". The assumption made by the learned Magistrate that the public was annoyed or injured by the act complained of, was not based on any evidence. It may very well be that the public was receiving the supply of petrol from other companies, and it did not matter to it whether or not the applicant restored possession of the goods to the opposite party. There is nothing on the record that there was any urgent case of nuisance or apprehended danger that called for the exercise of the

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extraordinary powers conferred by section 144, and, in my judgement, the order of the learned Magistrate was wholly without jurisdiction.

As already stated, it is provided by the section that the order is to remain in force only for a period of two months. This means that the order must not be in its nature irrevocable, and must be such that can be recalled on the expiry of two months. In the present case the order passed by the learned Magistrate directing delivery of the goods to the opposite party was unlimited in matter of time and, in my opinion, the learned Magistrate was not competent to pass such an order.

It remains to consider whether I have jurisdiction by setting aside the order of the learned Magistrate to direct that the register and the goods be re-delivered to the applicant. I think that section 561A of the Code empowers me, with a view to secure the ends of justice, to direct the opposite party to re-deliver the register and the goods to the applicant, and this must be done by the opposite party within a fortnight from the date that my order is communicated to the opposite party. The view that I take is in consonance with the view taken in the case of *Bhaganathi Servai* v. *Valayee* (1) and *Chandra Nath Mukerji* v. *Emperor* (2).

For the reasons given above I accept the reference, set aside the order passed by the learned Magistrate, and direct the opposite party to hand back the register and the goods to the applicant within two weeks from the date that this order is communicated to the opposite party. The learned Magistrate should take steps to communicate this order to the opposite party within a week from the date that the record is received back in his court.

(1) (1916) 33 Indian Cases, 830. (2) (1918) 47 Indian Cases, 803.

MISCELLANEOUS CIVIL.

Before Mr. Justice Ashworth.

1927
October, 28.

IN THE MATTER OF ALLAHABAD TRADING AND BANKING CORPORATION, LIMITED.*

Act No. VII of 1913 *(Indian Companies Act), section* 171—*Company—Liquidation—Decree illegally obtained against company in liquidation—Refusal of liquidator to pay.*

A company (bank) went into voluntary liquidation, and two liquidators were appointed, but one of them refused to accept the office. On July 17, 1924, an order was passed by the High Court directing that the liquidation be continued as a liquidation under the supervision of the court. On May 21, 1926, this order was superseded by a further order directing that the liquidation should be by the court. On July 10, 1924, certain creditors brought a suit against two of the directors, the manager, and the bank—described as in voluntary liquidation—through one of the liquidators, and obtained a decree (October 31, 1924) against all the four defendants. The decree was satisfied in part by the two directors in their personal capacity. Later the balance of the decree was claimed against the official liquidator, who refused to pay.

Held, that the liquidator was right in refusing, inasmuch as the decree was not binding on the company in liquidation, first, because it was in contravention of section 171 of the Indian Companies Act, 1913, and, secondly, because the liquidator against whom it was framed had no authority to act as a liquidator after his co-liquidator had refused to act.

The bar imposed by section 171 of the Indian Companies Act, 1913, cannot be waived by a liquidator. *Narasimham* v. *Subramaniam* (1), referred to.

THIS was an application under section 183(5) of the Indian Companies Act, impugning the action of the liquidator in rejecting the applicant's claim for payment of the amount due under a decree. The facts of the case are fully stated in the judgement of the Court.

*Miscellaneous Case No. 340 of 1924.
(1) (1927) A.I.R., (Mad)., 201.

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IN THE MATTER OF ALLAHABAD TRADING AND BANKING CORPORATION, LIMITED.

Mr. *A. Sanyal*, for the applicant.

Babu *Harendra Krishna Mukerji* (Official Liquidator), for the opposite party.

ASHWORTH, J. :—This is an application under section 183(5) of the Indian Companies Act, 1913, on the part of an alleged creditor of the Allahabad Union Bank, Limited, now under liquidation by the court, asking that a decision of the Official Liquidators (no date is mentioned) rejecting the petitioners' claim to realize against the company in liquidation the balance of a decretal sum due under a decree of the Subordinate Judge of Allahabad passed on the 31st of October, 1924, should be reversed.

The facts of the case are as follows. The Allahabad Union Bank, Limited (hereafter called the company in liquidation) by a resolution of the shareholders entered into voluntary liquidation on the 29th of June, 1924. The Liquidators appointed were Messrs. S. K. Day and Company of Calcutta and Mr. Kashi Narain Malaviya, a Vakil of the Allahabad High Court, who were appointed as joint Liquidators on a remuneration of Rs. 2,000. Mr. Malaviya never accepted the appointment. On the 17th of July, 1924, an order was passed by the Company Judge of this Court, directing the voluntary liquidation to be continued under the supervision of this Court. It may be remarked, although this fact is immaterial to the present question, that two years later, viz., on the 21st of May, 1926, this order was superseded by an order that liquidation should be by the court. Before the order of the 17th of July, 1924, the present petitioners brought a suit on the 10th of July, 1924, against two of the Directors and the Manager, Kedar Nath Mitter and the Allahabad Union Bank, Limited, which was described as being under voluntary liquidation through S. K. Day, Liquidator, at least such is stated in the present application. On the 31st of October, 1924, a decree for

Rs. 3,099 with costs and future interest was passed against all four defendants by the Subordinate Judge. The sum of Rs. 2,401-11-0 has been realized from the two Directors in their personal capacity. The Official Liquidators appointed by this Court refused to entertain the claim for the balance of Rs. 1,399-15-0. Their reasons appear to be as follows. Under section 171 of the Indian Companies Act (Act VII of 1913) the suit in pursuance of which the decree was obtained could not be proceeded with after the 17th of July, 1924, because on that date liquidation was under the supervision of the court, and it is not contested that section 171 applies to such liquidation as well as to liquidation by the court. The Official Liquidators, therefore, hold that the decree obtained is a nullity as against the company in liquidation. As regards the suggestion that the decree may be treated as a nullity, but the claim as a claim on the promissory note still exists, their contention is that the decree still operates as against the two Directors personally and consequently it cannot be said that the decree is altogether a nullity. So long as a decree, operative in part, subsists on the basis of the promissory note, it is impossible to treat the promissory note as in existence.

The petitioners impugn these arguments as follows. They first maintained that the suit against the bank was at any rate in order from the 10th up to the 17th of July, 1924. Even this contention seems open to question, and, if it were necessary, would be decided by me against the applicants. The suit was brought against the bank through S. K. Day, Liquidator. Mr. S. K. Day could in no way at that date be considered a Liquidator. In the first place it was not S. K. Day personally who was appointed Liquidator by resolution but S. K. Day and Co. In the second place, S. K. Day and Co. were not appointed Liquidators alone, but jointly with Mr. Malaviya. Where two persons are appointed Liquidators jointly, it

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is my view that the refusal of one of them to act renders abortive the resolution appointing them. One of them cannot take up the work alone, it clearly being the intention of the shareholders that they should act jointly and not separately. Then it is said that if the decree against the company in liquidation be abortive, the promissory note will, so to speak, revive. For the reasons urged by the Liquidators this argument is impossible. The decree is not altogether abortive. It subsists against the two Directors personally. Lastly it is urged that section 171 of the Companies Act will not operate as a bar to the validity of the decree against the bank because the Liquidators must be deemed to have waived this invalidity. It is said that the present Official Liquidators are but the legal successors of S. K. Day and he never raised any objection to the progress of the suit against the bank. This argument is met partly by the fact that, as held above, Mr. S. K. Day had no *locus standi* as a Liquidator. Apart from this I find no authority for holding that the Liquidators could waive the bar created by section 171 in such a way as to require them to admit a claim under decree rendered inoperative by that bar. I have been referred to a decision by a single Judge of the Madras High Court reported in *Narasimham* v. *Subramaniam* (1), where it was held that a decree obtained against a certain insolvent or certain insolvents would not be inoperative by reason of the requisite leave to sue not having been obtained, if such insolvent did not raise the plea at the time of the suit. This decision is not relevant. It was distinctly held in that case that the Official Receiver was not made a party to the suit and was, therefore, not bound by the decree. It was merely held that the decree might operate as against the insolvent. The finding that the Official Receiver was not bound by the decree is one that is destructive of the present application. In like manner the Official Liquidators in this

(1) (1927) A.I.R., (Mad.), 201.

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case are entitled to disown the decree. So the decision relied on, instead of being in favour of the petitioners, is against them. The counsel for the petitioners with great pertinacity maintains that his clients should be allowed to produce their account books to prove the claim. For the reasons set forth above by me there does not now exist any claim except the decree. In refusing to satisfy the decree the Liquidators have been held to be justified and there is nothing else in existence creating any liability against the insolvent company.

For the above reasons I hold that this application must fail. As an Official Liquidator has argued the case himself I make no order as to costs.

Application rejected.

APPELLATE CIVIL.

Before Mr. Justice Sulaiman and Mr. Justice Ashworth.

MUHAMMAD SHOAIB KHAN (PLAINTIFF) v. ZAIB JAHAN BEGAM AND OTHERS (DEFENDANTS).*

1927
November, 4.

Muhammadan law—Dower—Nature of widow's possession in lieu of dower.

The right of a Muhammadan widow is founded on her power as creditor for her dower, to hold the property of her husband, of which she has lawfully and without force or fraud obtained possession, until her debt is satisfied. But it does not follow from this that unless and until the widow actually enters into possession of the estate on the express assertion that she is taking possession in lieu of her dower debt, she cannot subsequently be allowed to raise such plea. *Mussumat Bebee Bechun* v. *Sheikh Hamid Hossein* (1), *Ali Bakhsh* v. *Allahdad Khan* (2) and *Ramzan Ali Khan* v. *Asghari Begam* (3), followed.

*First Appeal No. 69 of 1926, connected with First Appeal No. 388 of 1924, from a decree of Kashi Prasad, Additional Subordinate Judge of Aligarh, dated the 14th of May, 1924.

(1) (1871) 14 Moo. I. A., 377. (2) (1910) I.L.R., 32 All., 551.
(3) (1910) I.L.R., 32 All., 563.

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MUHAMMAD SHOAIB KHAN v. ZAIB JAHAN BEGAM.

THE facts of this case were as follows :—

This appeal and the connected first appeal No. 388 of 1924 arose out of two suits for recovery of possession brought by two sets of rival claimants against Musammat Zaib Jahan Begam, the defendant in possession. Bakhsh Ali Beg was the last full owner of the property in dispute and on his death he left a widow Musammat Hazur-un-nissa, a son Yusuf Beg and a daughter Musammat Hayat-un-nissa. The son and the daughter survived the widow. Thus they got a two-third and a one-third share, respectively, in the estate of Bakhsh Ali Beg. Yusuf Beg died in 1920, leaving Musammat Zaib Jahan Begam, his widow, and his sister as two of his heirs. The remaining share in his estate would go to the residuaries, if any, and failing them to the distant kindred. On the death of Yusuf Beg no claim was put forward either by any residuary or by distant kindred, and the names of Musammat Zaib Begam and Musammat Hayat-un-nissa were recorded on specific shares.

In 1922 Musammat Hayat-un-nissa died, and soon after her death the present plaintiff, Muhammad Shoaib Khan, obtained a sale-deed from Nur Beg and Yakub Beg who asserted themselves to be the residuaries of the deceased. Suit No. 39 of 1923, out of which this appeal arose, was instituted by Muhammad Shoaib Khan. The other suit was filed by Afsar Beg and others who claimed to be the distant kindred. In the mutation court Musammat Zaib Jahan Begam had succeeded mainly on the ground of her possession.

The rival claimants did not admit the title of the opposite party, and Musammat Zaib Jahan Begam denied the rights of both sides. The court below found in favour of Afsar Beg and others and held that they were the distant kindred, and found that the plaintiff Muhammad Shoaib Khan had failed to prove that his transferors

were the residuaries of the deceased. It further found that Musammat Jahan Begam was in possession of the estate left by Yusuf Beg, excluding, of course, her own share, in lieu of her dower-debt. The amount of her dower-debt was found to be Rs. 5,000. Musammat Zaib Jahan Begam submitted to the decree in favour of Afsar Beg and others, but Muhammad Shoaib Khan appealed in both the suits.

Mr. *A. M. Khwaja*, Mr. *T. A. K. Sherwani* and Maulvi *Mukhtar Ahmad*, for the appellant.

Dr. *M. L. Agarwala* and Munshi *Sarkar Bahadur Johari*, for the respondents.

THE judgement of SULAIMAN, J., after setting forth the facts as above and discussing the evidence produced by the plaintiff appellant, continued as follows :—

No doubt there are some circumstances in the conduct of the defendants which might seem to strengthen the plaintiff's case, but his case must stand or fall by his own evidence. In a case of this kind, when the deceased ancestors died a long number of years ago and when all the evidence that is forthcoming is of witnesses of small status it is not safe for us to differ from the view taken of that evidence by the learned Subordinate Judge who had the opportunity of seeing the witnesses and examining their demeanour. It may be that he has given some reasons which are not strictly sound, nevertheless his general impression of the evidence stands, and that is against the plaintiff.

It is not necessary for us to consider the other point which was raised in this appeal, namely, whether Musammat Zaib Jahan Begam has made out her case that she is in possession of the property left by Yusuf Beg in lieu of her dower-debt. The first argument is that at the time when the mutation of names was effected in her favour she did not profess to enter into possession

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Sulaiman, J.

in lieu of her dower-debt and that, therefore, she cannot be allowed to retain the property on that plea. No authority has been cited before us which would show that unless and until the widow actually enters into possession of the estate on the express assertion that she is taking possession in lieu of her dower debt, she cannot subsequently be allowed to raise such a plea. We are inclined to think that the observation of their Lordships of the Privy Council in the case of *Mussumat Bebee Bechun* v. *Sheikh Hamid Hossein* (1), makes it clear that "the right of a widow is founded on her power as a creditor for her dower, to hold the property of her husband, of which she has lawfully and without force or fraud obtained possession, until her debt is satisfied".

In many subsequent judgements the learned Judges have been careful to use the words "retain possession". We may also refer to the case of *Ali Bakhsh* v. *Allahdad Khan* (2), where RICHARDS, J., remarked: "In my opinion, where a Muhammadan widow, entitled to dower, gets quietly and peacefully into possession without fraud, she is entitled to retain possession until her dower-debt is paid"; and also to the remark of TUDBALL, J., in the case of *Ramzan Ali Khan* v. *Asghari Begam* (3), that "the balance of authority is in favour of the view that a widow, who from the nature of things on the death of her husband in many instances finds herself in possession of some, if not of the whole, of her husband's estate, is entitled to hold that estate against other heirs until her claim to dower is satisfied, without being asked to show either consent on their part or on that of the deceased husband".

It seems to me that if the power to retain possession of the estate so long as her dower-debt is not satisfied is exercised as a power of a creditor, the defendant Musam-

(1) (1871) 14 Moo. I.A., 377 (384). (2) (1910) I.L.R., 32 All., 551 (562).
(3) (1910) I.L.R., 32 All., 563 (566).

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mat Zaib Jahan Begam is entitled to say that her dower-debt must be satisfied before she is dispossessed, provided, of course, she did not enter into possession unlawfully or with force or fraud. There is no evidence to show that there was any force exercised or any fraud practised. Musammat Zaib Jahan Begam was undoubtedly a co-sharer, and her entering into possession, even of the undivided whole, cannot be called unlawful.

The next point urged is that on the death of Yusuf Beg she allowed Musammat Hayat-un-nissa's name to be recorded in the revenue papers and must, therefore, be taken to have given up possession of a part of the estate. The names of both were recorded jointly and the defendant has a finding of the revenue court in her favour that she was in possession of the whole even in the lifetime of Musammat Hayat-un-nissa. In any case she has now entered into possession both as an heir and on the claim of her dower. The mere fact that there was a contest in the mutation court is immaterial, for there was a similar contest in the case before their Lordships of the Privy Council referred to above. I am, therefore, of opinion that this circumstance does not debar the lady from pleading that so long as her dower-debt due from Yusuf Beg has not been satisfied, his heirs cannot dispossess her.

I would dismiss this appeal with costs.

ASHWORTH, J. :—I concur.

BY THE COURT. :—This appeal is dismissed with costs.

Appeal dismissed.

REVISIONAL CIVIL.

Before Mr. Justice Dalal.

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November, 8.

MUHAMMAD ALI (DEFENDANT) *v.* MAKTUB-UN-NISSA AND ANOTHER (PLAINTIFFS.)*

Act No. IX of 1887 *(Provincial Small Cause Courts Act), schedule II, article* 42*—Jurisdiction—Small Cause Court suit—Suit by one co-mortgagor who had been obliged to pay the entire decree on the mortgage for re-imbursement —Act No. IX of* 1872 *(Indian Contract Act), section* 69.

Only such suits are barred by the Provincial Small Cause Courts Act as are actually covered by the words of the different articles and not those which are in substance like suits described in those articles.

A suit, therefore, for contribution brought by one co-mortgagor against another—not being a suit falling under section 95 of the Transfer of Property Act, 1882, but rather under section 69 of the Indian Contract Act, 1872—is not excluded from the jurisdiction of a Court of Small Causes. *Talaimand Singh* v. *Gobind Singh* (1), *Gaya Pande* v. *Amar Deo Pande* (2), and *Raza Husain* v. *Hasan Jan* (3), referred to.

THIS was an application in revision against a decree of the District Judge of Budaun, upon the ground that the suit had been tried as a regular suit, whereas it ought to have been tried as a Small Cause Court suit. The facts of the case sufficiently appear from the judgement of the High Court.

Mr. *Akhtar Husain Khan*, for the applicant.

Munshi *Shiva Prasad Sinha*, for the opposite parties.

DALAL, J. :—I am afraid that this Court must interfere in revision, though it appears on the face of the record, as pointed out by the plaintiffs respondents' learned counsel, that substantial justice has been done. The

*Civil Revision No. 149 of 1927.

(1) (1915) 13 A.L.J., 694. (2) (1924) 22 A.L.J., 855.
(3) (1915) 13 A.L.J., 632.

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plaintiffs were heirs of one of two co-mortgagors and paid up the entire amount of the decree for sale obtained on the mortgage. Subsequently they brought the present suit for contribution against the defendant to the extent of his share in the property. The defendant has been held by the two subordinate courts to have been one of the mortgagors. Ground of revision No. 2, therefore, has no force. The difficulty arises, however, that the suit was tried regularly and not by a Court of Small Causes. The trial court referred to article 42, schedule II of the Provincial Small Cause Courts Act which takes away from the jurisdiction of that court a suit by one of several joint mortgagors of immoveable property for contribution in respect of money paid by him for the redemption of the mortgaged property. I have read the plaint of the present suit. It is based on the provisions of section 69 of the Contract Act. A person who is interested in the payment of money which another is bound by law to pay and who, therefore, pays it, is entitled to be reimbursed by the other. The present suit is not one under section 95 of the Transfer of Property Act, which says :—" Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession." The wording of clause 42, schedule II, of the Provincial Small Cause Courts Act is such that it must refer to a suit of the nature mentioned in section 95 of the Transfer of Property Act which is a suit for the enforcement of a lien by sale of mortgaged property. The learned counsel for the respondent very properly referred me to the case of *Talaimand Singh* v. *Gobind Singh* (1), where a learned Judge of this Court held that a suit like the present was in substance one covered by article 42. No reasons are given for the opinion. The learned Judge is not of opi-

(1) (1915) 13 A.L.J., 694.

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nion that the suit is the same as that referred to in article 42, but has stated that it was in substance such. I think, however, that only such suits are barred as are actually covered by the words of the different articles and not those which are in substance like suits described in those articles. In the present case the plaintiffs were compelled to pay money which the defendant was liable to pay, and the suit is based on an implied contract for re-imbursement. The suit is not brought under any of the sections of the Transfer of Property Act. I have been referred by learned counsel to other decisions of this Court, *Gaya Pande* v. *Amar Deo Pande* (1) and *Raza Husain* v. *Hasan Jan* (2). In those cases, however, the facts were not similar.

I set aside the decrees of the two subordinate courts and direct the court of the Munsif to return the plaint to the plaintiffs for institution of a suit in the Court of Small Causes having jurisdiction. Costs here and heretofore shall abide the result.

Decrees set aside.

APPELLATE CIVIL.

Before Mr. Justice Sulaiman and Mr. Justice Ashworth.

1927
November, 8.

PHUL CHAND AND ANOTHER (PLAINTIFFS) *v.* RAM NATH AND ANOTHER (DEFENDANTS).*

Act (Local) No. II of 1903 *(Bundelkhand Alienation of Land Act), section* 16*A—Act (Local) No. XI of* 1922 *(Agra Pre-emption Act), sections* 3, 7 *and* 12*—Pre-emption—Plaintiff not belonging to same agricultural tribe as vendor—Competence of Collector to sanction suit for pre-emption.*

Plaintiff claimed a right on the strength of a custom recorded in the wajib-ul-arz to pre-empt certain property, situated in Bundelkhand and sold by a co-sharer in the mahal to a

* Second Appeal No. 99 of 1926, from a decree of M. F. P. Herchenroder, District Judge of Cawnpore, dated the 13th of October, 1925, reversing a decree of Raghunath Prasad, Munsif of Banda, dated the 30th of March, 1925.

(1) (1924) 22 A.L.J., 855. (2) (1915) 13 A.L.J., 632.

non-co-sharer. Both the vendor and the vendee were members of an agricultural tribe. The plaintiff was not; but he had obtained the Collector's sanction to bring suits to pre-empt under section 16A of the Bundelkhand Alienation of Land Act of 1903 as amended by Act No. IV of 1915.

Held, that the plaintiff had lost all right of pre-emption, not only because, after the passing of section 3 of the Pre-emption Act, 1922, he could not claim to pre-empt on the basis of custom, apart from the provisions of the Act itself, but also because the land being in Bundelkhand, he was barred from any right to pre-empt, which he would otherwise have had under section 12 of the Pre-emption Act, by section 7 of that Act. *Suraj Bhan* v. *Somwarpuri* (1), referred to.

THIS was a plaintiffs' appeal arising out of a suit for pre-emption of property situated in Bundelkhand, which was sold on the 22nd of December, 1923. The vendor was a member of an agricultural tribe and so were the vendees, but the vendees were not co-sharers in the village at all. The pre-emptors, on the other hand, were not members of the same agricultural tribe as the vendor, but were co-sharers, not only in the mahal but in the very *khata* in which the share sold was situated. Before bringing their suit for pre-emption the plaintiffs obtained the sanction of the Collector under the Bundelkhand Alienation of Land Act, section 16A, as amended by Act No. IV of 1915.

The plaintiffs based their claim mainly on the custom recorded in the wajib-ul-arz of the village. The defendants contested the suit on the ground that the plaintiffs had no right to maintain the suit and that they had no preferential right as against them.

The trial court came to the conclusion that although "purchase", in view of the pronouncement of this Court in the case of *Suraj Bhan* v. *Somwarpuri* (1) did not include "pre-emption", nevertheless "pre-emption" did

(1) (1915) I.L.R., 37 All., 662.

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include "purchase". It, therefore, came to the conclusion that the plaintiffs, having obtained the sanction of the Collector to pre-empt this property, were persons who were entitled to purchase it under the Bundelkhand Alienation of Land Act.

The District Judge took a contrary view. In his opinion the right of pre-emption was entirely distinct from the right of purchase, and was a mere right of substitution. He was also of opinion that the reference in section 7 of the Agra Pre-emption Act to the Bundelkhand Alienation of Land Act, 1903, did not necessarily imply a reference to that Act as amended in 1915. He was further of opinion that by implication section 16A of the Bundelkhand Alienation of Land Act must be deemed to have been repealed by section 7 of the Agra Pre-emption Act, although the said provision is not mentioned in the schedule of repealed Acts. He, therefore, dismissed the suit. The plaintiffs appealed.

Dr. *Kailas Nath Katju*, for the appellants.

Dr. *Surendra Nath Sen* and Mr. *A. Sanyal*, for the respondents.

THE judgement of SULAIMAN, J., after setting forth the facts as above, thus continued :—

In my opinion there are two questions which have to be considered separately. The first is whether the Agra Pre-emption Act does confer a right on the present plaintiffs to maintain the suit and the second is whether, if it does not, it takes away any right which they might have had independently of it.

Section 7 of the Agra Pre-emption Act provides that "nothing in that Act shall confer a right of pre-emption on any person who is, under the Bundelkhand Alienation of Land Act, 1903, not entitled to purchase the property in dispute." In my opinion this section was merely intended not to confer a right of pre-emption on any per-

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son who was not entitled to purchase property in Bundelkhand. It does not mean that the section takes away the right of pre-emption of a person who had the right under the old Act.

Sulaiman, J.

I am inclined to the view that the learned Judge is in error in thinking that a reference to the Bundelkhand Alienation of Land Act, 1903, does not imply a reference to the Act as amended in 1915. The Act was referred to by its short title, and one would imagine that the Act so referred to is the Act as amended up to date. It is, however, not necessary for the purposes of this appeal to express a final opinion on this point. Section 16A dealt with the right to pre-empt, whereas section 7 of the Agra Pre-emption Act speaks of "entitled to purchase." It is, therefore, not necessary to invoke the aid of the provisions of section 16A.

The learned Judge has erred in thinking that section 16A has by implication been repealed. That section conferred no substantive right on a pre-emptor where he had none before; it merely placed the obstacle of sanction in the way of his suing, when such right existed. Even if his right of pre-emption is destroyed it does not necessarily amount to a repeal of section 16A. I would not say that the Collector has no jurisdiction to grant such a sanction, but I would say that such a sanction, even if granted, is now futile.

I am, however, in agreement with the learned District Judge that in view of the long standing authorities of this Court it must now be taken as settled that a right of pre-emption is not the same thing as a right of purchase. This is now further made clear by the definition of right of pre-emption as given in section 4, sub-clause (9) of the Agra Pre-emption Act. It, therefore, follows that the sanction obtained by the plaintiffs to *pre-empt* the property cannot strictly be taken to be a sanction to *purchase* it.

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Now section 3 of the Bundelkhand Alienation of Land Act makes it clear that the plaintiffs are not of such a class as by right to be entitled to purchase the property, but they might, if they obtain the sanction of the Collector, become so entitled. The plaintiffs are not absolutely entitled to purchase; their right is conditional. Even assuming that after sanction they can be said to have become entitled to purchase, it seems clear that a person, so long as he has not actually obtained the sanction to purchase, has not become a person entitled to purchase even under that provision.

In this particular case the present plaintiffs never obtained a sanction to *purchase* the property. They merely obtained sanction to *pre-empt*. I am, therefore, unable to hold that they are "entitled to purchase" the property under the "Bundelkhand Act" within the meaning of section 7 of the Pre-emption Act. Section 7 of the latter Act accordingly does not confer on them the right to pre-empt this property.

The next question is whether it takes away any right which they had. I have already quoted the section *in extenso*, and remarked that the intention merely was not to confer a new right on persons who had not that right. The lower appellate court is, therefore, wrong in thinking that it was contemplated by this section to take away the right of pre-emption vested in persons who had the right independently of the Act.

There is, however, section 3 of the Agra Pre-emption Act, which was neither noticed by the courts below, nor referred to by counsel before us. That section provides :—

> " No right of pre-emption shall be enforced in respect of any transfer made after the commencement of this Act of an interest in land in any area to which this Act applies, except in accordance with the provisions of this Act."

This is followed by a proviso that where there is no right of pre-emption under section 5, the Muhammadan law remains in force when the vendor and the pre-emptor are both Muhammadans. This proviso clearly shows that the section does not deal with procedure only, but affects substantive rights. It was obviously intended that in areas where the Act applies there can be no right of pre-emption except in accordance with the Act. The Pre-emption Act undoubtedly applies to Bundelkhand, and whatever right the present plaintiffs might have had independently of the Act, cannot now be enforced. They can only succeed if they are entitled under the Pre-emption Act to pre-empt. Although the Act applies to them, and they would come within the classes of persons mentioned in section 12, they are debarred from taking advantage of these provisions because section 7 expressly prevents the Act from conferring any benefit on them. The result is that section 3 takes away any right that they might have had independently of the Act, and section 7 prevents the conferring on them of any right under the Act. Thus they have lost all right of pre-emption. If such a result was not contemplated by the Legislature, there may have to be a further amendment of the Pre-emption Act. But as the provisions stand, I can come to no conclusion other than that indicated above. I would, therefore, dismiss the appeal.

AJHWORTH, J. :—I concur in the orders dismissing these appeals. The plaintiffs appellants claimed a right to pre-empt certain property sold in Bundelkhand by a co-sharer in the mahal to a non-co-sharer. The vendor was a member of an agricultural tribe. The plaintiffs were not; but they had obtained the Collector's sanction to bring suits to pre-empt under section 16A of the Bundelkhand Alienation of Land Act, 1903.

The Subordinate Judge decreed the suit. Mr. Herchenroder, District Judge of Cawnpore, dismissed it hold-

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ing that the last-named section was impliedly repealed by the Agra Pre-emption Act, 1922, being inconsistent with its general policy and that section 7 of the Pre-emption Act barred a claim to pre-emption under the statutory provisions of section 12 of that Act.

Section 7 of the Agra Pre-emption Act, 1922, runs as follows :—

> " Nothing in this Act shall confer a right of pre-emption on any person who is, under the Bundelkhand Alienation of Land Act, 1903, not entitled to purchase the property in dispute."

The Subordinate Judge held that this was no bar to the plaintiffs' suit because the words in section 7 of the Pre-emption Act "entitled to purchase" would include a person given such sanction by the Collector. The District Judge held that section 16A of the Bundelkhand Alienation of Land Act could not be invoked because it was not contained in the Bundelkhand Alienation of Land Act, 1903, but was added by an amending Act in 1915. He, therefore, held that "entitled to purchase" under the Bundelkhand Alienation of Land Act, 1903, would not include a person who obtained the Collector's sanction under section 16A to bring a suit for pre-emption. Further he held that the Agra Pre-emption Act must be deemed to have repealed any right of pre-emption conferred by the Bundelkhand Alienation of Land Act, even though there was no provision in the Pre-emption Act expressly repealing the Bundelkhand Alienation of Land Act as a whole or repealing in particular section 16A of that Act, as amended by the Act of 1915.

The reasons just stated do not commend themselves to me. A right to purchase is different from a right to pre-empt. The right of pre-emption is merely a right of substitution. Nor can a sanction to pre-empt be construed as a sanction to purchase. Separate provisions of the Bundelkhand Alienation of Land Act apply to each

kind of sanction and they cannot be confused. On the other hand, the reference in section 7 of the Pre-emption Act to the Bundelkhand Alienation of Land Act, 1903, must be construed to be a reference to that Act, as amended by the amending Act of 1915. When a short title is given in an original Act, the Act, however subsequently amended, can be called by that short title. To hold otherwise would be to hold that where the Legislature had prescribed a short title it was necessary to use a longer one. An amended Act is not two Acts but one Act. Again, the District Judge was wrong in inferring that an intention should be ascribed to a later Act to repeal the provisions of an earlier Act on general principles. The former enactment must be either specifically repealed or its continuance must be inconsistent with a provision of a later Act, in which case repeal will be deemed by necessary implication.

The correct view of this matter appears to me to be as follows. Section 16A of the Bundelkhand Alienation of Land Act only enables a Collector to sanction a suit for pre-emption where, but for the provisions contained in the earlier part of the section, the applicant for sanction has a right to pre-empt based on custom or contract. The sanction of the Collector does not create a substantive right, but is merely necessary for the otherwise existing substantive right to be exercised. The right of the plaintiff to pre-empt in this case was based on custom. That right which existed (subject to the restrictions on its exercise imposed by the said section 16A) up to the passing of the Agra Pre-emption Act ceased to exist when section 3 of the Pre-emption Act was enacted. This is the important section which the District Judge has overlooked. The effect of that section is clearly, as described in the marginal note, to abolish customary and other rights of pre-emption previously existing, excepting under the Muhammadan law. The plaintiff must claim

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a statutory right under the Agra Pre-emption Act or he cannot succeed. Such a right is barred by section 7 of the Agra Pre-emption Act, because the plaintiff is admittedly not entitled to purchase the property in dispute under the Bundelkhand Alienation of Land Act, 1903, even when amended by the Act of 1915. To discover what persons are entitled to purchase under the Bundelkhand Alienation of Land Act, 1903, we must refer to section 3 of that Act. That section provides that any person is entitled to purchase from an alienor who is not a member of an agricultural tribe or is a member of the same tribe as himself, etc. These conditions are admittedly not satisfied in this case. Sub-section (2) allows the Collector to sanction previously or retrospectively a purchase by any one, but sub-section (2) may be ignored for the purpose of interpreting section 7 of the Agra Pre-emption Act. For it is obvious that the Collector could never give a sanction to *purchase* to a person claiming to pre-empt and for these reasons no one would claim to pre-empt who could purchase directly. If there was no desire by the owner to sell, sanction would be clearly improper. Again, if the owner had already sold validly to another person, sanction would be improper. So there could never be a case of a person claiming to pre-empt getting sanction to purchase from the Collector, unless we are to suppose that the Collector might give a sanction to purchase merely in order to assist a would-be pre-emptor to overcome the bar imposed on him by section 7 of the Agra Pre-emption Act. On the principle that officials are presumed to do the right thing (*omnia praesumuntur rite et sollemniter esse acta*), we cannot suppose that the Collector would do anything of the kind. Apart from this, it is clear that the phrase "entitled to purchase" as used in section 7 of the Agra Pre-emption Act only refers to the persons given an unqualified right (i.e., a right independent of the Col-

lector's sanction) by section 3 of the Bundelkhand Alienation of Land Act. The operation of section 7 of the Agra Pre-emption Act cannot have been intended to depend upon the Collector's sanction. This section 7 appears to have been hastily added at a very late date in the proceedings culminating in the passing of the Agra Pre-emption Act, and although this fact cannot be adduced as an argument to control the meaning of section 7, it explains why reference in section 7 was not confined to the persons entitled to purchase the property in dispute under sub-section (1) of section 3 of the Bundelkhand Alienation of Land Act. Specification of sub-section (1) would have made the matter clearer, but would not have affected the meaning to be attached to section 7. A person claiming pre-emption could never have been given sanction by the Collector to purchase for the reasons stated.

I, therefore, hold that the decision of the District Judge was correct. The plaintiff's suit must fail not only because, after the passing of section 3 of the Agra Pre-emption Act, 1922, he could not claim to pre-empt on the basis of custom, but also because the land being in Bundelkhand, he was barred from any right to pre-empt which he would otherwise have had under section 12 of the Pre-emption Act by section 7 of that Act. I would, therefore, dismiss these two appeals with costs.

BY THE COURT :—Both the second appeals Nos. 99 and 100 of 1926 are dismissed with costs.

Appeal dismissed.

1927 November, 10.

Before Sir Grimwood Mears, Knight, Chief Justice and Mr. Justice Kendall.

RAMANAND AND OTHERS (PLAINTIFFS) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT).*

Regulation No. II of 1825, *article* 4—*Act (Local) No. III of* 1901 (*United Provinces Land Revenue Act*), *section* 99—*Permanent Settlement—Alluvion—Assessment of land added by alluvion to a permanently settled village.*

Where, subsequent to the date of the settlement, land is added by alluvion to a permanently settled village, there is nothing in the law to prevent such additional land being assessed to revenue. *Nogender Chunder Ghose* v. *Mahomed Esoff* (1), *The Secretary of State for India in Council* v. *Fahamidannissa Begum* (2), and *The Secretary of State for India* v. *Maharaja of Burdwan* (3), referred to.

THE facts of this case sufficiently appear from the judgement of the Court.

Dr. *M. L. Agarwala*, for the appellants.

Pandit *Uma Shankar Bajpai*, for the respondent.

MEARS, C.J., and KENDALL, J. :—This is the plaintiff's appeal from a decision of the Subordinate Judge of Mirzapur, who decided that certain land in the possession of the plaintiffs, situate on the east side of a stream, by name Jargo, was assessable to revenue. The plaint set out that the stream Jargo flowed between the villages Bagheri and Manikpur, and that each village was permanently settled. Paragraph 5, which was not admitted, ran as follows :—

"That according to custom or usage prevailing in the locality, land cut away by fluvial action from one village and added or accreted to another becomes the property of the proprietors of the village to which such land has been so added and becomes part and parcel of such village."

*First Appeal No. 485 of 1924, from a decree of Kameshar Nath, Subordinate Judge of Mirzapur, dated the 9th of September, 1924.

(1) (1872) 18 W.R., C.R., 113. (2) (1889) I.L.R., 17 Calc., 590.
(3) (1921) I.L.R., 49 Calc., 103.

Paragraph 6 alleged that—

"according to the said custom or usage the proprietors of villages liable to be affected by fluvial action have to bear any detriment or loss or enjoy any benefit or gain that may be caused by such fluvial action."

It was then said that more than 25 years ago the river Jargo began to cut away land from Manikpur and added such land to Mauza Bagheri and that by about the year 1907 some 30 acres of land had been so added to Bagheri. It was alleged that in a suit between the proprietors of Manikpur and Bagheri it was judicially decided that the said area had become the property of the owners of Bagheri. The contention was then put forward that as the added land had become part of the village Bagheri, which had been the subject of the permanent settlement, the proprietors of Bagheri were not liable to be assessed to revenue on account thereof.

After indicating certain points of law based upon Regulation II of 1819, Regulation II of 1825 and the Land Revenue Act (No. III of 1901), the plaintiff alleged that in disregard of the permanent settlement and of the absolute undertaking then given, the revenue authorities had assessed the said 30 acres to revenue, and the plaintiff asked for a declaration that the zamindars of Bagheri were not liable to pay any additional revenue in respect of the land detailed below. Some importance is to be attached to the word "additional". The plaintiffs also asked that the Government might be restrained from realizing the annual revenue, and that a sum of Rs. 4,200 paid under protest might be refunded to them.

A reference to the map marked G. M. and C. H. B. K. shows the stream Jargo flowing in a north-easterly direction and falling into the Ganges. The relatively straight red ink line marks the boundary between the two villages at the time of the settlement in 1882. The

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curved green pencil line superimposed on the red ink one marks the boundary line of the two villages at the time of the settlement in 1921. The areas hatched in green pencil are agreed to be the 30 acres in question in this case. The contention of the revenue authorities, when they assessed the land, was that they did so under the provisions of clause 4 of Regulation II of 1825 read with section 99 of the Land Revenue Act (No. III of 1901). Clause 4 provided that land gained by gradual accession—

"shall not in any case be understood to exempt the holder of it from the payment to Government of any assessment for the public revenue to which it may be liable under the provisions of Regulation II of 1819, or of any other Regulation in force."

The revenue authorities say that the Regulation in force when they imposed the assessment was the Land Revenue Act (No. III of 1901), and that section 99 entitled them in terms to assess this particular land. The section is as follows :—

"Land added by alluvion to a mahal may be assessed and settled by the Collector in accordance with rules made under section 234."

In the circumstances of the case it was quite certain that land had been added. It was quite certain that it had been added to a mahal, and in the opinion of the Board of Revenue the land so added was in its nature alluvion. They, therefore, assessed the 30 acres to revenue.

The plaintiff contested the legality of that assessment but an appellate order of the revenue court of the 1st of November, 1922, decided the assessment to be valid; and thereupon the plaintiffs brought this suit.

Dr. *Agarwala*, on behalf of the plaintiffs, contends that as the land of both the villages was permanently settled, no additional settlement could ever be imposed,

no matter in whose hands any particular area of land might happen to be at any moment. That is to say, if the zamindars of Bagheri held at any particular moment land which had been included in the permanent settlement of Manikpur, then the zamindars of Bagheri could claim that the added land should not be the subject of any taxation, because a portion of the revenue permanently settled was being in fact paid in respect of that land by persons living across the other side of the stream, namely, the zamindars of Manikpur. Dr. *Agarwala* contended that as the village of Bagheri was permanently settled, it must follow that everything which had become part of the village of Bagheri is by reason of the permanent settlement protected from further imposition. He also said that the added land could not fairly be called alluvion, and the Land Revenue Act (No. III of 1901) and the Circular 8-I were *ultra vires* in so far, if at all, as they purported to affect permanently settled land.

Before considering the law on this matter, it is necessary to state a few facts.

The facts in relation to the movement of the river and the deposit of the added area are as follows. During each and every rainy season, or during some but not every rainy season and during the period of subsidence of the river, the river Jargo has gradually altered its course, principally to the westward, cutting into Manikpur; but on two small sections it has moved eastward cutting into Bagheri. There has been no occasion on which the river has markedly altered its course, so that any zamindar of Manikpur could point to land of his which originally lying on the left bank of the river has suddenly appeared on the right bank. The result of the movement has been to add in a course of years the area of 30 acres to Bagheri and a relatively small area to Manikpur. The area of 30 acres was built up in the rainy seasons and during the subsidence of the river, as we have

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already said, month by month, but it was in the nature of a gradual and not a sudden accretion. We are of opinion that in the circumstances the land so added to Bagheri satisfies the meaning attached to the word "alluvion", which according to Webster's Dictionary is—

> "accession to land by gradual or momentarily insensible addition of matter by the action of water, or (as broadly used by some) by the insensible reliction of the water from its bank."

A much shorter definition is given in the Circular 8-I printed at page 186 of eighth edition of Dr. *Agarwala's* Commentary on the Land Revenue Act. There alluvion is said to mean "an actual increase in area caused by fluvial action." Dr. *Agarwala* objects to our acceptance of that definition, on the ground that the Board have no authority to define the meanings of words appearing in the statute. But taking the definition given by Webster, we are of opinion that the added area of land fits in with that definition and is in fact alluvion.

The first case to which we were referred was that of *Nogender Chunder Ghose* v. *Mahomed Esoff* (1). This case does not establish any principle of law which helps Dr. *Agarwala*, but contains a convenient summary of Regulation No. II of 1825 (at page 118 of the report). The Judges point out the fourth section of the Regulation is divided into five clauses, and the first deals with land gained by gradual accession (i.e., alluvion in the proper sense of the word).

He brought to our notice the case of *The Secretary of State for India in Council* v. *Fahamidannissa Begum* (2) and it certainly is an authority in point and has helped us to arrive at a decision in this case. Their Lordships of the Privy Council, after dealing with the opening clauses of Regulation II of 1819, discussed at page 600 of the report the various clauses of section 31. It

(1) (1872) 18 W.R., C.R., 113. (2) (1889) I.L.R., 17 Calc., 590.

seems perfectly clear that lands permanently settled are not to be the subject of any additional assessment, and the decision of the revenue authorities may be reversed by a civil court, "in any case in which it shall appear that lands which actually formed at the period in question a component part of such an estate have been unjustly subjected to assessment." The important words are, of course, "lands which actually formed at the period in question component part of such an estate."

Now this added land did not at the date of the permanent settlement form any part of the village of Bagheri, and the position has been that since the year 1907, according to the pleadings, the zamindars of Bagheri have been holding these 30 acres revenue-free. The difficulty in Dr. *Agarwala's* way throughout has been the very short answer that this land was never included in the permanent settlement of 1793 with the zamindars of Bagheri. At that date Bagheri had an acreage of 735 *bighas*, 4 *biswas*, and at the time of the assessment complained of the acreage was 797 *bighas*, 8 *biswas*, the increase being represented by the 30 acres in dispute.

Another case cited before us was that of *The Secretary of State for India* v. *Maharaja of Burdwan* (1). There is a marked difference in the facts of that case and the one we are at present considering, but there is an important passage which we shall quote :—

> " On an analysis of the terms of these regulations, so far as they are material to the question now under consideration, it appears that, while lands included in a permanent settlement were carefully excluded from further assessment, this protection was extended only to lands actually in existence at the time of the settlement and specifically included in the estate as settled."

Their Lordships further point out at page 116 of the report that "property is one thing and assessability is

(1) (1921) I.L.R., 49 Calc., 103.

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another". In the present case we accept the statement of the plaintiffs that a suit was brought with reference to the ownership of this particular 30 acres and it was decided that that new land must pass to the zamindars of Bagheri; but because the property in the land has been declared to be theirs, it by no reason follows that that land is not assessable.

The plaintiff's contention, limited to the assertion that they are entitled to hold land permanently settled free from any additional settlement, is good; but when the investigation discloses that the land was not included in the permanent settlement of Bagheri, it becomes apparent that clause 4 of Regulation II of 1825 and section 99 of the Land Revenue Act (No. III of 1901) come into operation. It was contended in fact that revenue on the basis of a permanent settlement was paid by the zamindars of Manikpur. That may be so. The zamindars of Manikpur may, if they please, ask for relief against a payment in respect of land which has passed out of their possession. The zamindars of Bagheri wish to take credit for the payment made by the zamindars of Manikpur, but no case has been cited by Dr. *Agarwala* in support of that supposed right and in our opinion the test must be whether the lands in dispute ever formed the subject of a permanent settlement in the hands of the present zamindars of Bagheri—that is, formed part of that estate so permanently settled. It is conceded that they did not.

As in our view the land is alluvion and as it cannot be said that the assessment in dispute is an additional one, we are of opinion that this case is governed by article 4 of Regulation II of 1825 and section 99 of the Land Revenue Act. Agreeing therefore with the learned Subordinate Judge, we dismiss this appeal with costs.

Appeal dismissed.

Before Mr. Justice Sulaiman and Mr. Justice Kendall.

TARA KIRAN AND ANOTHER (PLAINTIFFS) *v.* HARI KISHAN DAS AND OTHERS (DEFENDANTS).*

1927 November, 15.

Hindu law—Joint family property—Capacity of mother as de facto *guardian of her minor son in the compulsory absence of the father to borrow for the purpose of discharging debts due by the father.*

The father in a joint Hindu family, consisting of himself and two minor sons, was convicted in a riot case and sentenced to a long term of imprisonment. Whilst he was in jail and the mother was left as *de facto* guardian of her minor sons, she raised money on a mortgage of some property which her husband had given her, mainly to pay off some debts of his, and to some extent other debts which she had herself incurred on promissory notes. The mortgage being put into court was held for technical reasons to be invalid, but a personal decree was given against the mother.

Held, that the judgement creditor was competent under this decree to proceed against the joint family property, so far as the previous debts of the father were concerned. *Debi Mangal Prasad* v. *Mahadeo Prasad* (1), *Devji* v. *Sambhu* (2), and *Veerabadra Aiyar* v. *Marudaga Nachiar* (3), referred to.

THE facts of this case are fully set forth in the judgement of the Court.

Mr. *B. E. O'Conor*, Dr. *N. C. Vaish*, Munshi *Bhagwati Shankar* and Munshi *Kailas Chandra Mital*, for the appellants.

Dr. *M. L. Agarwala*, Dr. *Surendra Nath Sen* and Dr. *Kailas Nath Katju*, for the respondents.

SULAIMAN and KENDALL, JJ. :—This is a plaintiffs' appeal arising out of a suit for a declaration by the sons of Jagannath Prasad that the joint property belonging to the family was not attachable and saleable in execution of a simple money decree obtained by the defendant No. 1

*First Appeal No. 143 of 1925, from a decree of Joti Sarup, Second Subordinate Judge of Saharanpur, dated the 18th of December, 1924.

(1) (1912) I.L.R., 34 All., 234. (2) (1899) I.L.R., 24 Bom., 135.
(3) (1910) I.L.R., 34 Mad., 188.

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against their mother. The facts leading up to this litigation are as follows:—Jagannath Prasad and his two minor sons, the present plaintiffs, formed a joint Hindu family and owned considerable property. About 1918, Jagannath Prasad became heavily indebted, though it is not clear that there were any mortgages on his estate in existence at that time. In October, 1918, he was arrested in connection with the Katarpur riot and admittedly remained in jail till August, 1919, when he was actually convicted. At first he was ordered to be transported for life, but later on the sentence was reduced to one of seven years' imprisonment.

On the 10th of February, 1919, while Jagannath Prasad was in jail, he executed a deed of gift of a 5 *biswa* share in *mauza* Nasirpur Khurd in favour of his wife Musammat Parbati. The recital contained in the deed is that she was faithful and obedient to him and he had love for her and in consideration thereof he had gifted the property to her. Subsequently, on the 27th of June, 1921, which was long after his conviction, Musammat Parbati executed a deed purporting to be a mortgage-deed for Rs. 15,500 in favour of the defendant Hari Kishan Das. This document was attested by Jagannath Prasad himself. It recited that there were debts due from the lady and her husband Jagannath Prasad and it was necessary to make arrangements for their payment. The consideration consisted of Rs. 3,133 set off against an amount due to the creditor himself, about Rs. 3,000 due from the executant on the basis of promissory notes executed by her and the balance of about Rs. 8,000 and odd on account of previous debts of Jagannath Prasad. Under this document she hypothecated the share which had been gifted to her by her husband. In 1924, the defendant sued and obtained a decree for recovery of this amount, but the decree was only a simple money decree inasmuch as he failed to prove that the document had been duly

attested and was effective to create a charge on the property. In execution of this decree he sought to attach the very property which had been included in the deed. An objection was raised on behalf of the minors in the execution department, and these objections being disallowed, the present suit for declaration was filed.

The plaintiffs' case in the plaint was that the document purporting to be a deed of gift in favour of their mother was a wholly fictitious document and that it was never given effect to and she never obtained possession under it. It was further asserted that the father had no power in law to gift the property to the mother and, therefore, the transfer was in no way binding on the plaintiffs. In his written statement the defendant pleaded that it was the duty of Jagannath Prasad to maintain his wife, Musammat Parbati, and to provide her food and raiment and that it was with that object that he gifted a very small portion of the estate to her and gave it to her as *stridhan* property of which she became an absolute owner. The written statement then went on to allege that the mortgage-deed was executed for the purpose of raising money to pay off the previous debts of Jagannath Prasad and for raising money to meet the expenses of the criminal case which was pending against him, and that the document was executed with the consent of Jagannath Prasad and was binding on the plaintiffs.

The learned Subordinate Judge has rejected the theory that the deed of gift was executed in lieu of maintenance and has also rejected the theory put forward in evidence on behalf of the plaintiffs that it was a fictitious document executed in anticipation of an apprehended confiscation of Jagannath's estate. His finding amounts to this that the property was given to Musammat Parbati under an absolute gift by which she became full owner. He has then gone on to find that the money under the

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mortgage was borrowed by Musammat Parbati for paying the debts of Jagannath Prasad and for defraying the expenses of the defence of her husband and, therefore, she was entitled as *de facto* guardian of the plaintiffs to contract debts to pay off such previous debts of their father. On these findings he has decided the main issues which arose in the case against the plaintiffs. As the defendant did not in the written statement take up the position that the gift was made to Musammat Parbati in order to enable her to raise funds for the purpose of meeting the expenses of the defence, and inasmuch as we find that the bulk of the amount raised under the mortgage-deed was to pay off the debts which had been incurred long before the criminal prosecution, we find it very difficult to accept the hypothesis of the learned Subordinate Judge that the transfer was made with that object in view. As a matter of fact even up to the time when interrogatories were sent for the examination of Jagannath Prasad the defendant's case appears to have been that the gift was made for Musammat Parbati's maintenance, as the frame of the question No. 10 in the interrogatories would suggest. This theory is, therefore, contrary to the defendant's pleading and contrary to the recital in the deed of gift and we find it difficult to accept it. If the gift was made for the purposes of maintenance of Musammat Parbati then it will be very difficult to hold that it conferred an absolute estate on her. On principle it would seem that when the necessity for the maintenance should disappear, the gift itself would come to an end. We might refer to the case of their Lordships of the Privy Council—*Debi Mangal Prasad* v. *Mahadeo Prasad* (1) where the share allotted to a widow on a partition in lieu of her maintenance was held not to confer an absolute estate on her but to devolve on the heirs of her husband after her death. There would be no objection to the

(1) (1912) I.L.R., 34 All., 234.

validity of a transfer in lieu of maintenance, because in our opinion the view of the court below that the property transferred was only a fractional share of the whole estate is correct. According to its view it amounted to one-fifth of the whole estate and according to the evidence of the witnesses for the defendants it did not amount to more than one-sixth—in any case it would not be an unreasonably large share.

We are, however, of opinion that the second ground which is made the basis of the decision of the court below is sounder. The position at the time was this, Jagannath Prasad was confined in jail and was unable to look after the management of the estate. His two sons were minors of tender age and were utterly unable to manage the estate. The only person who could look after the affairs under the circumstances was his wife. She was also the *de facto* guardian of the minor sons for the time being. At that time there were large debts outstanding against the husband Jagannath Prasad. There is no suggestion in this case that these debts were in any way tainted with immorality or illegality, nor has it been suggested that these debts were not in fact due. The position, therefore, was that the creditors of Jagannath would have sued for their debts and in execution of the decrees obtained by them would have proceeded against the family estate by attachment and sold it off in satisfaction of their claims. It is also a fact that the family had to defend Jagannath Prasad in the criminal case pending against him. That case proved to be very expensive and according to Jagannath Prasad's own statement something like Rs. 20,000 or 25,000 was spent by the members of his family for his defence. Jagannath Prasad admits that a good part of this amount was borrowed by his wife Musammat Parbati. Some of the accounts of the creditors like those of Khub Chand show that the borrowing commenced after Jagannath had been actually arrest-

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ed. One of the promissory notes on which money was borrowed by Musammat Parbati is dated the 1st of July, 1919, while Jagannath Prasad was undergoing his trial. There was, therefore, full justification for the court below to record a finding that the bulk of the amount was raised either for the purpose of paying off debts due from Jagannath Prasad or for meeting the expenses of his defence. This, however, cannot be said with regard to two items borrowed by Musammat Parbati under promissory notes, dated the 30th of September, 1920, and the 22nd of July, 1921, which were long after the conviction of Jagannath Prasad.

Even when allowing the creditors to sue for their money by obtaining decrees and proceeding against the family estate, Jagannath Prasad obviously allowed his wife to raise money in order to pay off the bulk of these debts. That the defendant acted in good faith is abundantly proved by some of the letters, which have been proved, which passed between the parties at the time. In his statement Jagannath Prasad has admitted that the money was raised by his wife with his full consent and he actually attested the document. There is plenty of documentary evidence to prove that Hari Kishan Das has paid off the previous debts which were specified in the deed executed by Musammat Parbati. The only thing that had happened is that in the suit which was instituted by Hari Kishan Das, the present plaintiffs were not impleaded as parties. If they had been impleaded they would probably have been represented by their mother as *de facto* guardian, and in view of the fact that they were not challenging the validity of those debts it is difficult to see what defence they could have put forward to that suit. Although, therefore, technically speaking, they were not represented in that proceeding, it is quite clear that they have not been prejudiced in any way substantially. We are, therefore, of opinion that,

although the decree in execution was obtained against the plaintiffs' mother on the basis of a deed executed by her under which she herself had raised the money, the debt which is the foundation of this decree was incurred in order to pay off the previous debts of the plaintiffs' father which were binding on the family. The case is somewhat analogous to the case of *Devji* v. *Sambhu* (1). The principle laid down in that case was subsequently approved by the Madras High Court in the case of *Veerabadra Aiyar* v. *Marudaga Nachiar* (2). The difference between the present case and that before the Bombay High Court is that here the husband was not dead but was in jail, whereas in the Bombay case the husband was dead, but in both cases the property did not devolve on the widow but on the minor sons, and the decree had been obtained against the widow personally without impleading the minor sons. Another distinction perhaps is that in the Bombay case the suit was brought to recover the debt due by the husband himself, whereas in the present case the suit was brought to recover the debt due by the lady which had been raised for the purpose of paying off the debts due by the husband. We, however, think that the principle underlying that case applies to the present case, and that it would be inequitable to hold that the plaintiffs are not bound by the decree obtained against their mother, even though the original debts which were the basis of the decree were really binding on them.

The defendant, however, has failed to prove that the two debts raised by Musammat Parbati on the promissory notes of 1920 and 1921 were in any way binding on the plaintiffs.

We accordingly allow this appeal in part and modify the decree of the court below to this extent that we declare that the family property of the plaintiffs is not liable to attachment and sale so far as the amount, together

(1) (1899) I.L.R., 24 Bom., 135. (2) (1910) I.L.R., 34 Mad., 188.

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with interest, due on the promissory notes of 1920 and 1921 is concerned, and that it can be attached and sold in satisfaction of the decree for the remaining amount. We direct that the parties should receive and pay costs in proportion to their success and failure.

Appeal allowed in part.

Before Mr. Justice Lindsay and Mr. Justice Banerji.

1927 *November*, 16.

PARAS RAM AND OTHERS (DEFENDANTS) *v.* NEKSAI (PLAINTIFF) AND JUGAL KISHORE AND OTHERS (DEFENDANTS).*

Act (Local) No. XI of 1922 *(Agra Pre-emption Act), section* 4(10)*—Pre-emption—" Sale "—Transfer under a compromise decree.*

No suit for pre-emption will lie where a transfer of property is brought about by a decree, although that decree may be based on a compromise. *Intizar Husain* v. *Jamna Prasad* (1), and *Abdur Razzaq* v. *Mumtaz Husain* (2), referred to.

THE facts of this case sufficiently appear from the judgement of the Court.

Munshi *Sarkar Bahadur Johari*, for the appellants.

Munshi *Gadadhar Prasad*, for the respondents.

LINDSAY and BANERJI, JJ. :—We think the judgements of both the courts below in this case are wrong. The suit was a suit for pre-emption and the transfer in respect of which the right of pre-emption was claimed was described as being a transfer by way of sale. Both the courts below were of opinion that this transfer was " tantamount to a sale " and, therefore, pre-emption was allowed.

The facts may be stated very shortly as follows :— By arrangement which was made under a compromise decree one Jagarnath became liable to transfer a 1 pie

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*Second Appeal No. 2089 of 1925, from a decree of E. L. Norton, District Judge of Jhansi, dated the 1st of June, 1925, confirming a decree of Shri Nath, Munsif of Orai, dated the 7th of March, 1925.

(1) (1904) 1 A.L.J., 247. (2) (1903) I.L.R., 25 All., 334.

share of property which was coming to him to one Puran, to whom the other party to the decree in that compromise suit owed a sum of Rs. 545.

Jagarnath, having got the property and being in a position to transfer this 1 pie share to Puran, as he was bound to do under the terms of the compromise decree just referred to, failed to convey it to Puran. Puran then resorted for help to three men, Paras Ram, Achhru and Phundi Lal and it was arranged between them that a suit should be brought against Jagarnath's representatives (Jagarnath having died in the meantime) in order to make them hand over the 1 pie share which Jagarnath had been under an obligation to convey. And so there was a suit between Puran and his three associates on the one side ranged as plaintiffs and Jugal Kishore and Har Das, the representatives of Jagarnath, who were arrayed as defendants. The result of this case was a compromise upon which a decree was passed and the effect of the decree was that the two defendants, the representatives of Jagarnath, were under the duty of handing over a 12 *krants* share to Puran and the other three plaintiffs.

The decree passed on this compromise bears date the 29th of October, 1923, and the plaintiff Neksai comes into court and says that he is entitled to pre-empt the transfer which has been sanctioned by this compromise. As we have said, the court of first instance said that this transfer under the compromise decree was " tantamount to a sale " and that Neksai was, therefore, entitled to pre-empt. This view has also been accepted by the lower appellate court. We do not agree. In the first place, it is clear that under the Agra Pre-emption Act which governs the present case, a right of pre-emption can only be claimed in respect of sale or foreclosure. This is made clear by a reference to section 10 which defines when a right to bring a suit for pre-emption arises.

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The transfers which are pre-emptible being confined to sales and foreclosures, we have to consider what the meaning of the term "sale" is in this Act (Act No. XI of 1922). There is a definition of sale in section 4 (10) of the Act and it says that " sale " means a sale as defined in the Transfer of Property Act, 1882. The definition of " sale " in this latter Act is contained in section 54, and bearing in mind that any transfer under the Transfer of Property Act must be an act such as is described in section 5 of that Act, " transfer " means an act by which a living person conveys property, in present or in future, to one or more living persons, or to himself or one or more other living persons, and " to transfer property " is to perform such act. It seems to us to be impossible to apply this definition of " transfer " and of " sale " in the Transfer of Property Act to a decree of a court and we cannot, therefore, allow the contention that a transfer which is effected under the sanction of a decree of court can be treated as a sale and can be pre-empted under the Agra Pre-emption Act. There are two Bench rulings of this Court which are referred to in the judgement of the lower appellate court. One is *Intizar Husain* v. *Jamna Prasad* (1). In that case it was distinctly held by a Bench of this Court that a right of pre-emption does not arise upon a transfer effected by virtue of a decree though the decree is passed upon compromise. In this judgement the learned Judges followed another judgement of theirs reported in *Abdur Razzaq* v. *Mumtaz Husain* (2). The learned Judge of the lower appellate court has attempted to distinguish these rulings from the present case, but no valid distinction can be drawn. It is perfectly true that these judgements were delivered before the coming into force of the Agra Pre-emption Act but that fact cannot make any difference. We are definitely of opinion that a sale which is pre-emptible in this

(1) (1904) I.A.L.J., 247.

(2) (1903) I.L.R., 25 All., 334.

Act must be strictly a sale as defined in the Transfer of Property Act, 1882, and that a transfer of property which is brought about by a decree of court cannot for purposes of pre-emption be treated as a sale in the Act.

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The result, therefore, is that the plaintiff had no suit. We allow this appeal, set aside the decrees of the courts below and direct that the plaintiff's suit do stand dismissed with costs to the contesting defendants in all three courts.

Appeal allowed.

REVISIONAL CRIMINAL.

Before Justice Sir Cecil Walsh and Mr. Justice Iqbal Ahmad.

EMPEROR *v.* SUKHAI AHIR AND OTHERS.*

1927 *November*, 17.

Criminal Procedure Code, section 537—Irregularity—Riot —Cross cases—Use of evidence given in one case as evidence in the other—Inferences from consent of counsel to irregular procedure.

There were two cases of riot being tried by the same Magistrate, which, though technically distinct, were both parts of the same controversy. The Magistrate, having tried one of the cases, when he came to the second, treated some of the evidence in the first case, by agreement of counsel in either case, as evidence in the second case—as though it had been solemnly repeated all over again by the witnesses or had been read over to them and acknowledged to be correct, although it was not formally transferred to the record of the second case.

Held, that, inasmuch as the accused could not point to any way in which they might have been prejudiced, the procedure, though irregular, did not vitiate the trial. *Queen-Empress* v. *Chandra Bhuiya* (1), followed.

While no serious defect in the mode of conducting a criminal trial can be justified or cured by the consent of the

*Criminal Reference No. 565 of 1927.

(1) (1892) I.L.R., 20 Calc., 537.

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advocate of the accused, the fact that a certain course of procedure was in fact consented to by counsel for an accused person is an important element in considering the equally important question whether there has been any prejudice. *Abdul Rahman* v. *King-Emperor* (1), followed.

THE facts of this case sufficiently appear from the judgement of the Court.

Pandit *Kapil Deo Malaviya*, for the applicants.

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

WALSH and IQBAL AHMAD, JJ. :—This case has been referred to two Judges of this Court by another member of the Court who was dealing with a reference by the Sessions Judge. The reference raises the broad question, where there are strictly speaking two cases of riot which are practically one controversy, how far a Magistrate, who tries both, whether as separate cases or simultaneously at one hearing, may treat the evidence given in the first case in order of date, which has not been repeated in the second case and has not been formally transferred to the record, as evidence in the second case, as though it had been solemnly repeated all over again by the witnesses or had been read over to them and acknowledged by them as part of the evidence in the second case. We think that all these cases, which are not of uncommon occurrence, and the difficulties which occasionally arise in the procedure, must be judged, each by its own particular circumstances. As has been said in one case, and as the learned Judge referring this case pointed out, a court has no right, technically speaking, to consider at all the evidence given in one case for the purpose of reaching his conclusions in another, and if the two cases are totally unconnected, it is obviously impossible to say that such a procedure could be covered by the general excuse that no prejudice could be done to either side. If the two cases

(1) (1926) L.R., 54 I.A., 96.

deal with separate issues, even although they arise out of the same set of circumstances and to some extent raise the same controversy, and if also the parties claim that the evidence in the first case is irrelevant to the issues in the second case, the matter is clear. But if the reception of the evidence required to enable the point to be decided in the second case is merely a formal repetition of evidence, which has already been given and heard and possibly also decided by the same tribunal and it is directed to the same issue or issues of fact, its vain repetition may be reasonably waived. If the parties for their own convenience, and other obvious motives, consent to treat the evidence in the former case as though it had been repeated in the latter case, such evidence is by implication and for all practical purposes brought on to the record of the second case, although not actually recorded. Whatever may be said about the Magistrate's handling of the merits, with which we have at this moment nothing to do, the explanation which he tendered dealing with this objection which was before the Sessions Judge, is a singularly clear and able document. He sets out the facts which are important in this as in every other case, and it is upon those facts alone that we propose to dispose of this matter.

In this village there are two parties who have been fighting for eight or ten years. They have had so much friction and so many cases that it is impossible to obtain a single independent witness to any thing which occurs between them. On the 22nd of January of this year they had a fresh dispute. Both parties made a report against the other in the usual way, one to the *thana*, one by wire to the Sub-Divisional Officer. The police made inquiry and came to the conclusion that strictly speaking there were two separate riots, although they were intimately connected with one another, and this is a most important fact in what we have to decide. Each party alleged in his own defence that there was only one riot.

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The party, who may be said to be complaining in this reference, set up an incorrect motive, which the Magistrate disbelieved. He has given his reasons for not believing it and he says that the reasons which he gives were features common to both cases, that is to say, the prosecution in one case conducted its case and framed its evidence upon the same theory which it asked the court to accept as the theory in defence of the charge against it in the second case. Nor is it as though the evidence relied upon by the complainants in this reference in their own defence was confined merely to the evidence of witnesses whom they had already called in the counter case; they called separate evidence as well and the Magistrate says that they relied upon the same motive as the evidence given on the same motive in the other case had been directed to establish which he had disbelieved. He says that without a reference to the evidence in the other case which had not been technically brought upon the record in the second case, he would have been forced, in the absence of evidence to the contrary, to come to the conclusion that the motive was established and he rightly says that he would have found himself in a most absurd situation, created by the law as it is suggested to be by this reference, of disbelieving something in one case and believing it in the other under precisely similar circumstances. He submits, by the way, as a matter of argument that where two incidents and two charges arising out of the same circumstances have to be dealt with strictly as two cases and two charges, although they are in substance one, either that each case should be tried by a different Magistrate, or that if a Magistrate tries both, he should allow himself to be assisted by evidence in one case not technically recorded in the other. But in addition to the facts above stated it appears that although separate judgements were written and although the charges and cases were separate, and,

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therefore, would ordinarily be heard independently, in substance they were heard together and the arguments in both cases were heard on the same day and were addressed to the court by the same gentlemen, who freely referred to the evidence in the one case in support of their arguments in the other, and were therefore, on behalf of their clients guilty of the very irregularity which their clients now ask the High Court to say renders the trial a nullity.

We agree with what was said by their Lordships in their judgement in *Queen-Empress* v. *Chandra Bhuiya* (1), the case quite rightly referred to by the Magistrate in his explanation, and we are not satisfied that the case referred to by the Sessions Judge is really applicable. In the Calcutta case in question it was held that where two cross-cases of riot and grievous hurt were committed separately, a trial before a Sessions Judge, who having heard the evidence in the first case heard the evidence in the second case, examined some of the accused in one case as witnesses for the prosecution in the other and *vice versa*, and subsequently heard the arguments in both the cases together; this mode of trial, although irregular, did not prejudice the accused in their defence, and under such circumstances a re-trial was not necessary by reason of such irregularity. The case seems to us to be exactly in point.

It so happens that we are able to seek guidance and considerable assistance from two recent decisions in the Privy Council. There is one, namely *Abdul Rahman* v. *King-Emperor* (2), in which the irregularities with regard to the depositions were considerable, but were held by the Privy Council as having been rightly treated by the High Court as an irregularity curable under section 537 of the Code, it being clear that no failure of

(1) (1892) I.L.R., 20 Calc., 537. (2) (1926) L.R., 54 I.A., 96.

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justice had been occasioned by the irregularities complained of in that case. We refer to the case partly for that reason but mainly because it lays down a principle, which it is well to bear in mind. We have referred to the mode in which the hearing and the arguments in the two cases were conducted by the pleaders. No consent by counsel, whether for his own convenience, or that of his client, or for the convenience of the court, can by itself create jurisdiction in the court to commit irregularities; nor can the commission of irregularities of a serious nature substantially affecting the conduct of the trial and prejudicing the accused be waived, merely by consent on the part of the accused's representative. As the Privy Council puts it:—"No serious defect in the mode of conducting a criminal trial can be justified or cured by the consent of the advocate of the accused". All we mean to say in this case and in similar cases is that the consent of counsel to such procedure as was adopted here is obviously an element and an important element to take into account in considering the equally important question whether there has been any prejudice.

Lastly, there is a recent decision of the Privy Council in *Madat Khan* v. *King-Emperor*, in which special leave was granted to an appellant from the High Court at Lahore for the purpose of considering what is practically the same complaint as is made in this case. The case does not appear to have been reported, presumably because it was not considered to lay down anything new, but we refer to it because of its valuable re-statement of the principle by which this case has to be decided. Its official designation is Privy Council Appeal No. 72 of 1926. As in this case, two parties were charged for attacks on each other in the same occurrence and the charges were tried separately at two distinct trials and were tried by the same tribunal. Lord

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HALDANE thus expresses the opinion of their Lordships :—

"Naturally the evidence given for the prosecution was similar to a substantial extent. In each case each party, no doubt, was a witness against the other, but, on the other hand, there was also independent evidence. In a case of that kind it is almost impossible to keep the cases wholly separate. The High Court gave one judgement but treated the case as two cases. It is said that they imported considerations from one case into the other. When one looks at it, to some extent that was inevitable and to some extent it did so happen."

We may pause here to note that that is just what the explanation of the Magistrate says—

"There was, however, a body of separate evidence which was applicable to each case which in itself was enough for the conviction."

With regard to one case, the Magistrate tells us that the separate evidence was not itself enough for the conviction and to that extent this case differs. Although technically it might have been better to keep the evidence entirely distinct and to have delivered two separate judgements, no injustice has followed from what was done.

We think both authority and reason compel us to reject this reference except to the extent to which we propose to interfere, as will appear in a moment. We, however, might add that even if the case were not so clear as it appears to us to be, we should have hesitated a very long time before directing what would appear to us to be almost the disaster of a re-trial of this unfortunate quarrel.

We propose, however, to ameliorate the fines in both cases. It is, perhaps, as well to state the principle on which we do so. Taking individually one of the fines inflicted on one of the persons, it does not seem in itself very large and probably would not have surprised that particular individual, and in one sense it is the fault of

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the parties themselves that the number of persons fined is very large, and that, therefore, the total sum is substantial. But on the other hand, as every one knows, these faction fights consist very largely of either a particular set of families or a particular set of *biradari*, and when the individual fine is multiplied by a large number, no doubt it falls very heavily on the whole community. We, for this reason, reduce the fines in each case from Rs. 25 to Rs. 15 under section 147 and from Rs. 25 to Rs. 10 under section 323 in case of each of the persons who was convicted by the Magistrate in the two cases. In other respects the order of the Magistrate will stand. The fines, if paid, shall be refunded.

FULL BENCH.

Before Sir Grimwood Mears, Knight, Chief Justice, Justice Sir Cecil Walsh and Mr. Justice Kendall.

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November, 22.

JAMES PETER SHERRING (PETITIONER) *v.* SHAHZADI SHERRING (RESPONDENT) AND JACKSON IBRAHIM PETER (CO-RESPONDENT).*

Divorce—Husband's petition—Wife charged with committing adultery—Misconduct of petitioner—Discretionary bar—Principles governing exercise of discretion vested in matrimonial court.

In the trial of matrimonial cases, the court must have regard not only to the rights and liabilities of the matrimonial person wronged and of the wrong-doer, respectively *inter se*, but also to the interests of society and public morality, and the court should, therefore, in the exercise of every discretion which is vested in it, endeavour to promote virtue and morality and to discourage vice and immorality while exercising its discretion.

Where Parliament has not thought fit to define or specify any cases, or classes of cases, for its application the court ought not to limit or restrict that discretion by laying

*Matrimonial Reference No. 5 of 1926.

down rules within which alone the discretion is to be exercised. *Morgan* v. *Morgan* (1), *Constantinidi* v. *Constantinidi* (2), *Wyke* v. *Wyke* (3), *Pretty* v. *Pretty* (4), *Schofield* v. *Schofield* (5), *Tickner* v. *Tickner* (6), *Constantinidi* v. *Constantinidi* (7), and *Wickins* v. *Wickins* (8), referred to.

THIS was a husband's petition for divorce on the ground of his wife's adultery, in which a *decree nisi* was granted by the District Judge in September, 1926.

The case was before the High Court for confirmation in May, 1927, when the Court's attention was drawn to the fact that the petitioner admitted that he had contracted syphilis during his married life, and a Bench of the Court, presided over by the CHIEF JUSTICE, remitted the case to the District Judge's Court for a decision, without fresh evidence, whether this fact did not constitute a discretionary bar. The matter remitted was disposed of by another District Judge in July of this year, who held that the discretion might be suitably exercised in the petitioner's favour, because the husband's record, though not spotless, was not so bad as his wife's and it did not appear that "any useful purpose could be served by refusing to dissolve a bond that had ceased to perform any useful function".

The parties were Indian Christians, engaged in mission work. They were married in January, 1919, and the first and only child was born to them in December, 1919, at Palwal, where the husband and wife resided. Miss Shahzadi, the wife, had been a member of the Baptist Church at Palwal, the husband being connected with the Church Missionary Society. Miss Shahzadi had been intimate before marriage with the co-respondent, to whose brother her sister was married, and she had had a child by the co-respondent. The

(1) (1869) 1 P. and M., 644.
(2) (1903) P., 246.
(3) (1904) P., 149.
(4) (1911) P., 83.
(5) (1915) P., 207.
(6) (1924) P., 118.
(7) (1905) P., 253.
(8) (1918) P., 265.

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trial court found that adultery, as alleged in the petition, was proved against the respondent, and refused, as mentioned above, to consider the fact that the husband had, during his married life, contracted syphilis while in Bombay, to be a discretionary bar to its granting a decree *nisi*.

On the decree coming up again for confirmation—

Mr. *O. M. Chiene*, for the petitioner.

The other parties were not represented.

The judgement of the Court (MEARS, C. J., and WALSH and KENDALL, JJ.), after stating the facts, proceeded to discuss at some length the evidence relating to the alleged adultery. The Court found itself unable to confirm the finding of the District Judge that the wife's adultery was proved. The judgement then continued :—

On the whole, therefore, we come to the conclusion that the finding of adultery against the respondent and co-respondent cannot be confirmed, that the respondent is entitled to a finding of "not guilty" on this issue, and that on this ground alone the petition must be dismissed. The woman's misconduct before marriage must have been fairly well-known in the community. Her marriage with the husband no doubt rehabilitated her, and there are expressions in her letters which show how keenly she realized this, and it is difficult to understand what motive she should have had, after deciding to marry Mr. Sherring and being willing to bear him children, for continuing a connection with the co-respondent which could do her no good, and would probably put an end to any chance of her continuing a respectable member of the community.

It is, however, incumbent upon us to continue our consideration of the case, as if we were in agreement with the Judge in his finding against the wife. This

consideration raises questions of importance in the administration of the Divorce Act.

First we have to consider the state of mind of the petitioner when he was in Bombay. According to Irene, if she ever mentioned the alleged adultery at Palwal to her father, a fact which her father does not himself mention, she did not mention it until her father returned from Bombay. According to the husband he learnt of his wife's infidelity in some casual conversation with the co-respondent's brother, a circumstance strange, if true, and not consistent, either with a desire on the part of the co-respondent to continue in mission work in Bombay, or with an insidious attempt, as is alleged, on the part of the co-respondent to persuade Mr. Sherring to bring his wife to Bombay. But if this conversation ever took place, Mr. Sherring does not connect his adultery in Bombay with it. It was not an isolated act of adultery. According to the evidence he kept this woman, who was a Bombay prostitute, for some 2 or 3 months, and probably contracted syphilis from her. Even this is not certain, because he pretended to the court that he had been told by a Doctor that it was the result of something he had eaten. It would be in our opinion a case of the worst possible example if we were to treat this as one of those acts of adultery which could be brought by the court within any rule, however much extended, upon which a Matrimonial Court has acted in such cases.

The importance of this case is that, although the question of a discretionary bar is not one of frequent occurrence, it has to be dealt with in the lower courts of these Provinces, without the assistance of the English Law Reports where the principles of English practice, which we are bound to follow, are laid down, and without the advantage of expert assistance from the Bar.

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The principles deducible from the English cases were formerly as follows:—If a petitioner's adultery has no special circumstances placing it in some category capable of distinct statement and recognition, the court will refuse to grant a decree. The court will not assume to itself a right to grant, or withhold, its decree upon the mere footing of the petitioner's adultery being more or less pardonable or capable of excuse; *Morgan* v. *Morgan* (1). "A loose and unfettered discretion", it was there said, "is a dangerous thing to entrust to a single Judge". Re-marriage in the belief that the first wife is dead, or in ignorance that the decree *nisi* did not dissolve the marriage, and adultery long pardoned and condoned, and not repeated, are three cases in which the discretion has been exercised. Cases in which it has been exercised in favour of a husband are rare; *Constantinidi* v. *Constantinidi* (2). Even in the case of a wife, no feeling of sympathy can be entertained. Her adultery must be shown to have been caused directly by her husband's cruelty and adultery; *Wyke* v. *Wyke* (3). This principle of direct causation has been applied occasionally to a husband, but BARGRAVE DEANE, J., said that misconduct may be excusable in a woman which would not be excusable in a man; *Pretty* v. *Pretty* (4). In more recent cases, the practice in England seems to have been somewhat relaxed in favour even of a husband, e.g., Sir SAMUEL EVANS, the President, exercised his discretion in one case in favour of a husband petitioner who, years after his wife had deserted him, had committed an isolated act of adultery with a woman whom he intended to marry, resulting in the birth of a child, and who had concealed it from the court. The President, in his judgement, founded it upon grounds of public morality, and the interests of the woman and her child; *Schofield* v. *Schofield* (5). The most recent decision is

(1) (1869) 1 P and M., 644.
(2) (1903) P., 246.
(3) (1904) P., 149.
(4) (1911) P., 83.
(5) (1915) P., 207.

that of the President, Sir HENRY DUKE as he then was, in *Tickner* v. *Tickner* (1). The decision of Lord ST. HELIER in *Constantinidi* v. *Constantinidi* (*supra*) was subsequently discussed in the Court of Appeal, and the President quotes from VAUGHAN WILLIAMS, L. J., "the court must have regard not only to the rights and liabilities of the matrimonial person wronged, and of the wrong-doer respectively *inter se*, but also to the *interests of society and public morality*" (2). He also quotes STIRLING, L. J., as having said :—"in the exercise of every discretion which is vested in the court, the court should endeavour to promote virtue and morality and to discourage vice and immorality" (3) He further quoted SWINFEN EADY, M. R., in *Wickins* v. *Wickins* (4) : "Where Parliament has not thought fit to define or specify any cases, or classes of cases, fit for its application, this Court ought not to limit or restrict that discretion by laying down rules within which alone the discretion is to be exercised". He ultimately prefers the broader view thus enunciated to the more restricted one of confinement to special categories of cases, as originally laid down in *Morgan* v. *Morgan* (5), and exercises his discretion in favour of the wife-petitioner, in that case, on grounds of public policy.

We are of opinion that, if the above principles are kept steadily in view, there ought to be no difficulty in the courts of these Provinces exercising the discretion rightly in any case in which the question arises. As we have said already, we are unable to approve the reasoning by which the District Judge reached his decision in this case, and we have no alternative but to decline to confirm the decree, which must be set aside. The husband must pay the costs both of the wife and of the co-respondent.

Decree set aside.

(1) (1924) P., 118.
(2) (1905) P., at p. 270.
(3) (1905) P., at p. 278.
(4) (1918) P., at p. 272.
(5) (1869) 1 P. and M., 644.

FULL BENCH.

Before Mr. Justice Lindsay, Mr. Justice Sulaiman and Mr. Justice Mukerji.

1927 *June*, 28. *November* 25.

SECRETARY OF STATE FOR INDIA IN COUNCIL (RESPONDENT) *v.* MAKHAN DAS (APPELLANT).*

Act No. I of 1894 (*Land Acquisition Act*), *section* 23, *sub-section* (1), *clause first*—*Act* (*Local*) *No. VIII of* 1919 (*United Provinces Town Improvement Act*), *schedule*, *paragraph* 10, *clause* (3)—*Improvement Trust*—*Valuation of land acquired for purposes of a Trust.*

Held (1), that the correct interpretation of section 23, sub-section (1), clause (1) of the Land Acquisition Act, 1894, as amended by paragraph 10, clause (3) of the Schedule to the United Provinces Town Improvement Act, 1919, is that the market-value of the land to be acquired is to be calculated exclusively in accordance with the use to which the land is being put on the date on which notice issues under section 29 or section 36 of the United Provinces Town Improvement Act; and (2) that where on such date the land to be acquired is not being put to any use, its market-value may be nil.

THE facts of this case were as follows :—

Some thirty years ago, one Makhan Lal of Cawnpore purchased five and a half bighas odd of land on the outskirts of Cawnpore. In course of time about half of this land was leased out to petty tenants to build huts on; some of the remainder was leased to a man who had an oil-mill on it, and the rest, being apparently land with scattered trees on it, was not used at all; it was neither cultivated nor let. About the year 1921, the Improvement Trust of Cawnpore started proceedings for the expropriation of this land under the provisions of the Land Acquisition Act, 1894. There was a dispute as to the valuation, which culminated in an appeal to the High Court. The High Court on this appeal assessed the value of the land, according to the provisions of section 18 of the Act, at twenty years' purchase of the rental,

*Application for review of judgement in First Appeal No. 109 of 1923.

amounting to Rs. 13,881-4-0, *plus* 15 per cent. for compulsory acquisition, *plus* some other small items.* Subsequently an application for review was presented by the respondent upon the main ground that the court had omitted to consider that the case was really one with which the United Provinces Town Improvement Act, 1919, was concerned; that that Act had amended the Land Acquisition Act, 1894, in a material particular regarding the system of valuation so far as the United Provinces were concerned, and, therefore, the valuation arrived at by the High Court, being based on the Act as unamended, was incorrect.

This application came before a Bench consisting of LINDSAY and SULAIMAN, JJ., who asked for a reference to a Full Bench of the matters set out in the beginning of that Bench's judgement.

On this reference—

Pandit *Uma Shankar Bajpai*, for the applicant.

Dr. *Kailash Nath Katju*, for the opposite party.

The following was the decision of the Full Bench :—

LINDSAY, J. :—There are two questions referred to this Full Bench for decision, namely :

(1) What is the correct interpretation of section 23, sub-section (1), clause first, of the Land Acquisition Act (Act I of 1894) as amended by paragraph 10, clause (3) of the Schedule to the United Provinces Town Improvement Act, 1919 (United Provinces Act VIII of 1919) and (2) how is the law as so interpreted to be applied to a case where at the material date the land to be acquired was being put to no actual use?

As regards the first question it is at once apparent that the amendment above referred to materially affects the scope of the first clause of section 23, sub-section (1) as originally enacted, for the market-value of the land

See 25 A.L.J., 137.

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which has now to be taken into consideration is the "market-value according to the use to which the land was put at the date with reference to which the market-value is to be determined under that clause".

In the cases to which section 23, sub-section (1), clause first, has been applied it has always been held that the potential value of the land should be taken into account. To quote from the judgement of the House of Lords, in *Fraser* v. *City of Fraserville* (1): "The seller is entitled to the value to him of the property in its actual condition at the time of its expropriation, with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for the purpose for which the property is compulsorily acquired." These principles cannot be applied to cases arising under the United Provinces Town Improvement Act, for, as pointed out, the expression "market-value" has under this Act a *narrower meaning*. "Market-value" is to be assessed in accordance with the use to which the land is being put at the date when the notice issues under section 36 of that Act.

It is, therefore, not possible for the purposes of this Act to take into account any potential value of the land; no valuation can be made with reference to what has been called "the most advantageous disposition of the land".

The consideration of potential value being excluded, the question is what factors can be considered when assessing the market-value according to the use to which the land was put at the material date.

The basis of compensation should be the value to the owner at the date of the notification, and *primâ facie* this would depend upon the profit which on that date the owner is deriving from the land, and that profit could be estimated from the use to which, at that point of time,

(1) (1917) A.C., 187 (194).

the land was being actually put. No great difficulty could arise in dealing with a case where, at the material date, the land is actually being used.

But what is to be said in a case where on this date the land is not being used for any apparent purpose which can bring in profit to the owner? Is it to be taken that in the absence of immediate profit the land is of no value to the owner, that its market-value is nil and that, in consequence, the Improvement Trust can expropriate the owner without paying him compensation?

That is a conclusion to be avoided, if possible, for it involves the inference that the Legislature has conferred upon the Trust authorities a power of confiscation. There is no express provision to the effect in the Act. It remains to be considered whether the existence of a power of confiscation must be inferred by necessary implication :—

"The market-value of the land shall be the market-value according to the use to which the land was put at the date with reference to which the market-value is to be determined under that clause."

The language of the section is rigid. The governing words are "according to the use to which the land was put, etc.". The determining factor is the actual use of the land at the date in question, and any use of the land prior to that date is to be disregarded.

In view of this phraseology it appears to be impossible, for the purpose of assessing the market-value, to resort to any other facts such, for example, as the history of the land, its physical features or its situation; for while data of this nature might otherwise be of weight as indicating the value of the land to the owner, they could only be of service in estimating a potential value based upon the use to which the land might most profitably be put. But the section expressly excludes all consideration of potential use by laying down that the determining

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factor in the assessment of the market-value is the actual use to which land is being put on the date of the notification: and from this the conclusion appears to be that either intentionally or through inadvertence the Legislature has declared that in certain conditions the market-value of the land on the material date may be nil.

Lindsay, J.

It need hardly be pointed out that such an enactment is fraught with much possible hardship to owners of property which has become subject to the operation of the Act. Lands of great value may, from a variety of causes, fall temporarily out of use. Agricultural land may have to be left fallow for a season or two in order that it may recover productivity. Or the owner of a valuable site acquired for a building scheme may have to suspend the execution of his project in order, for example, to contest in court a claim to a right of way over the land. In either case the owner is liable to be expropriated without compensation if a notification issues under the Act while the land is not being put to actual use.

It is difficult to imagine that cases of this kind were in contemplation when the Act was passed, but the language of the Act, as it stands, must, if followed, lead to these results. It must be left, therefore, to the Legislature to declare whether it was intended to invest the Improvement authorities with this power of confiscation, or to amend the Act so as to avoid the results above-mentioned.

In my opinion we must answer the two questions referred to the Full Bench as follows:—

(1) The correct interpretation of section 23, subsection (1), clause first, of the Land Acquisition Act as amended by paragraph 10, clause (3) of the Schedule to the United Provinces Town Improvement Act, 1919 (United Provinces Act VIII of 1919) is that the market-value of the land to be acquired is to be calculated exclusively in accordance with the use to which the land is

being put on the date on which notice issues under section 29 or section 36 of the United Provinces Town Improvement Act; and (2) where on such date the land to be acquired is not being put to any use its market-value may be nil.

SULAIMAN, J. :—I agree.

MUKERJI, J. :—I agree.

[On receipt of the Full Bench decision the original Bench decided as follows :—]

LINDSAY and SULAIMAN, JJ. :—This is a case in which a review of judgement had been allowed, but before the application could be disposed of it was found necessary to refer the case on a question of law to a Full Bench. The Full Bench delivered its judgement on the 28th of June last. The case has come back to us for decision in accordance with the principles laid down by the Full Bench decision.

The matter before us is now a matter of calculation, and the figures have been worked out in the presence of the learned counsel for both sides. It is agreed now that the proper amount which should be awarded to Makhan Das in respect of the land which has been acquired by the Improvement Trust of Cawnpore is Rs. 10,048-4-0.

The tribunal awarded a sum of Rs. 8,609-9-6 and so the result is that in this Court Makhan Das has been given Rs. 1,438-10-6 more than what was given to him by the commissioners.

We allow the appeal, therefore, to the extent indicated, and we allow Makhan Das his costs in both courts on Rs. 1,438-10-6. We also think that Makhan Das is entitled to interest on this sum at the rate of 6 per cent. per annum from the date of the acquisition of his land till the date of payment. A fresh decree, therefore, will be prepared on the lines above indicated.

Appeal allowed.

MISCELLANEOUS CIVIL.

Before Mr. Justice Ashworth.

1927 *November*, 25.

IN THE MATTER OF THE DEHRA DUN-MUSSOORIE ELECTRIC TRAMWAY COMPANY, LIMITED. (IN LIQUIDATION) : IN THE MATTER OF PANNA LAL (OBJECTOR).*

Company—Liquidation—Official liquidator—Position of a liquidator as compared with that of the company before liquidation—Costs of proceedings out of court.

Liquidation gives the official liquidators a cause of action which the company may not by itself have possessed.

A member of a company in liquidation is, therefore, liable in respect of unpaid calls, even though as against the company the realization of such calls may have become barred by limitation. *Jagannath Prasad* v. *The U. P. Flour and Oil Mills Company, Limited,* (1) followed.

Held further, that the liquidators' claim against an alleged contributory in respect of a certain definite number of shares would not be affected by the fact that the company had previously sued the contributory and had obtained, on a compromise, a decree in respect of only half the number of shares.

Held also, that costs of proceedings out of court by a liquidator in sifting claims and objections ought not to be awarded against the claimants or objectors.

THIS was an objection raised by Rai Bahadur Panna Lal against an order of the official liquidators of the Dehra Dun-Mussoorie Electric Tramway Company, Limited, placing him on the list of contributories in respect of 500 shares in the company. The facts of the case sufficiently appear from the judgement of the Court.

Munshi *Panna Lal,* for the objector.

Dr. *Kailas Nath Katju,* for the official liquidators.

ASHWORTH, J. :—In this case Rai Bahadur Panna Lal objects to an order of the official liquidators contain-

*Miscellaneous Case No. 96 of 1926.

(1) (1916) I.L.R., 38 All., 347.

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ed in their report dated the 10th of November, 1927, that his name shall be placed on the list of contributories as a person liable to contribute to the assets of the company with respect to the shares purchased by him and for which his name still stands in the books of the company. Those shares are 500 in number.

On behalf of Rai Bahadur Panna Lal, Mr. *Panna Lal*, advocate, appears. He has put in, on the 21st of November, 1927, a statement of his objections containing four paragraphs. He has, however, admitted that he is not in a position to contend that this Court cannot go behind the compromise decree of the year 1924, in view of recent decisions of this Court on the matter. He, therefore, confines the objection to two grounds. The first ground is that his client, even if entered as a contributory, should only be entered as one in respect of 250 shares. His argument is that more than three years have elapsed since the call of 50 per cent of the shares subscribed to by his client, and that the company and the official liquidators are barred by the law of limitation from now calling up 50 per cent. This argument appears to me to be settled by various decisions both of the English courts and of the Indian courts. I need only refer to a Division Bench decision of this Court, *Jagannath Prasad* v. *The U. P. Flour and Oil Mills Company, Limited* (1). It was there held that a member of a company is liable in respect of unpaid calls, even though as against the company the realization of such calls may have become barred by limitation.

The second point taken is that the putting of Mr. Panna Lal's name on the list of contributories or the retention of his name on that list amounts in effect to the enforcement of the claim for subscription of half the 500 shares, and it is urged that this claim is barred under

(1) (1916) I.L.R., 38 All., 347.

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the law of *res judicata*. It is said that the compromise decree of 1924, referred to above, was arrived at in pursuance of a suit by the company against Mr. Panna Lal. The argument is that if this Court can go behind the compromise decree, it must be deemed that this suit was withdrawn without any liberty to bring another suit. The answer to this is that it is not the company which is now claiming contribution by Mr. Panna Lal, but the official liquidators. Liquidation gives the official liquidators a cause of action which the company may not itself have possessed. Just as a claim, if brought by the company, might be held to be barred by limitation, but not if brought by the official liquidators, in the same manner a claim which might be held to be barred by the Civil Procedure Code if brought by the company, can be preferred by the official liquidators under the provisions of the Companies Act. Apart from this, however, I am not prepared to admit that the fact that in law the liquidators or the court can go behind a decree can be deemed to produce the same effect as if the suit in the course of which the decree was obtained had been withdrawn. This appears to me an impossible fiction. The suit was not withdrawn, but was decided; but the court and the liquidators can ignore the decision. The nearest analogy would be a case that was still pending. It is impossible to suggest that a pending case can operate in any way to preclude the decision of a matter by another tribunal, provided that that other tribunal has power to decide the matter notwithstanding its having been raised in the other court.

For the above reasons, I dismiss this objection and affirm the action of the official liquidators in placing the name of Rai Bahadur Panna Lal on the list of contributories and in showing against his name 500 shares. Costs of this application or objection, whichever it be called, will be borne by Rai Bahadur Panna Lal, objec-

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tor, according to the ordinary scale in civil cases. The counsel for the official liquidators asks that they may be given special remuneration for the labour performed by them in sifting this claim out of court. I am of the opinion that *primâ facie* this remuneration cannot be required to be paid by Mr. Panna Lal. I am told that there are instances where this has been done, but, in the absence of authority or proof of practice, I am unable to decree such remuneration as costs. It appears to me that it would be opening a very wide question if costs could be obtained by the official liquidators in respect of out of court proceedings. I make no order, therefore, as to this remuneration, but the official liquidators can apply in the ordinary way for special remuneration from the company's assets.

Objection disallowed.

APPELLATE CIVIL.

Before Mr. Justice Lindsay and Mr. Justice Sulaiman.

1927
November, 25.

KESAR KUAR (DEFENDANT) *v.* KALLU RAM (PLAINTIFF).*

Zamindar and tenant—Co-parcenary mahal—Position of a co-parcener not incompatible with that of a tenant.

There is nothing in law to prevent a co-sharer in a co-parcenary mahal from having tenant rights of any kind and being liable to the payment of rent either to another co-sharer or to the general body of co-sharers, and if a tenant subsequently acquires proprietary rights in the land, his tenancy does not automatically come to an end in its entirety. *Mahabir Singh* v. *Ahsanullah* (1), *Abul Hasan Khan* v. *Bhura* (2), and *Jamna Prasad Rai* v. *Damri* (3), followed.

*Second Appeal No. 481 of 1926, from a decree of E. Bennet, District Judge of Agra, dated the 25th of November, 1925, reversing a decree of Irfan Ali Beg, Assistant Collector, First Class of Agra, dated the 8th of September, 1921.

(1) Weekly Notes, 1901, p. 53. (2) Weekly Notes, 1906 p. 226.
(3) (1914) Vol. I, Unpublished Decisions of the Board of Revenue, p. 77.

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THE facts of this case sufficiently appear from the judgement of the Court.

Dr. *Kailas Nath Katju* and Munshi *Benod Behari Lal*, for the appellant.

Munshi *Kamla Kant Varma*, for the respondent.

LINDSAY and SULAIMAN, JJ. :—This is a defendant's appeal arising out of a suit for arrears of rent brought by Kallu Ram against Musammat Kesar Kuar. The suit was dismissed by the Assistant Collector, but on appeal it was decreed by the District Judge. His findings on some of the points were not clear. Accordingly, a former Bench of this Court framed three issues and remanded the case with directions that the learned Judge should dispose of the case on the lines indicated by the issues.

The learned District Judge has upheld his former decree.

The plots in dispute were recorded as the tenancy of one Sri Ram and, on his death, were recorded in the name of his widow, Musammat Kesar Kuar. Kallu Ram was recorded as the lambardar and the proprietor of the mahal in which these plots are situated. In 1917 there was a dispute between the parties in the civil court and the matter was referred to the arbitration of three arbitrators and an award was pronounced on the 31st of May, 1918, followed by a decree of the civil court. Under this decree Musammat Kesar Kuar was given a half share in the proprietary interest in the mahal.

The learned District Judge has found, and his finding is one of fact, that the defendant has failed to prove that she had any proprietary interest in the mahal prior to the award of 1918. She must, therefore, be treated as a tenant of the plots prior to that date. Since then, however, she has become a co-sharer entitled to an equal share with Kallu Ram in the proprietary interest in the mahal.

The learned District Judge has given the plaintiff a decree for half the amount of rent due on account of these plots, holding that the tenancy to the extent of one half has become merged in the proprietary interest acquired by Musammat Kesar Kuar since the award.

The point which has been urged before us on behalf of the appellant is that having become a proprietor in the mahal she has ceased to be a tenant, and the only remedy now open to the plaintiff is a suit for profits in which the rent could be taken into account and adjusted. It is further urged that a person cannot both be a zamindar and a tenant in one and the same mahal. But there cannot be a complete merger of two rights unless the two are co-extensive. We are of opinion that this point is concluded by a series of authorities, which it is not now possible to disturb. We may refer to the case of *Mahabir Singh* v. *Ahsanullah* (1), followed subsequently in S.A. No. 303 of 1918, decided on the 28th of February, 1918, and *Abul Hasan Khan* v. *Bhura* (2). We may also mention that the Board of Revenue has accepted the same principle, as shown by the case of *Jamna Prasad Rai* v. *Damri* (3). All these cases are authorities for the proposition that there is nothing in law to prevent a co-sharer in a co-parcenary mahal from having tenant rights of any kind and being liable to the payment of rent either to another co-sharer or to the general body of co-sharers, and that if a tenant subsequently acquires proprietary rights in the land his tenancy does not automatically come to an end in its entirety.

In view of these authorities we are of opinion that this appeal must be dismissed.

The result, therefore, is that this appeal is dismissed with costs.

Appeal dismissed.

(1) Weekly Notes, 1901, p. 53. (2) Weekly Notes, 1906, p. 226.
(3) (1914) Vol. I, Unpublished Decisions of the Board of Revenue, p. 77.

MISCELLANEOUS CIVIL.

Before Mr. Justice Ashworth.

1927 *November*, 25.

IN THE MATTER OF SRI YOGASHRAM PHARMACY, LIMITED (IN LIQUIDATION) : IN THE MATTER OF MOHAN LAL MEHTA (PETITIONERS).*

Act No. VII of 1913 *(Indian Companies Act), section* 215—*Company—Liquidation—Power of court in a voluntary liquidation to stay execution of decrees against the company.*

Held, on a construction of section 215 of the Indian Companies Act, 1913, that the court has power, in a voluntary liquidation, to stay further proceedings in execution of decrees obtained against the company prior to the resolution for voluntary liquidation, though that is a power which in a compulsory liquidation does not exist, because the statute itself forbids execution being taken out. *Anglo-Baltic and Mediterranean Bank* v. *Barber and Co.*, (1) and *Black and Co's Case* (2) referred to.

THE facts of this case sufficiently appear from the judgement of the Court.

Babu *Indu Bhushan Banerji*, for the applicant.

ASHWORTH, J. :—This is an application for stay of execution of two decrees obtained against a company in voluntary liquidation. The decrees were obtained a few days before liquidation was resolved upon by the company. It is said that there are only these two decrees against the company, and that the assets of the company have only realized Rs. 800, while the liabilities of the company amount to Rs. 6,000. These decrees together amount to just over Rs. 100. No one appears for the decree-holders.

This application is made under section 215 of the Indian Companies Act, which reproduces word for word section 193 of the English Act of 1908. It enacts that

*Miscellaneous Case, No. 989 of 1927.

(1) (1924) 2 K.B., 410. (2) (1872) 8 Ch. App., 254.

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the liquidator may apply to the court to exercise any of the powers which the court may exercise if the company were being wound up by the court. I have asked the liquidator to explain what is the power that he wishes this Court to exercise, and in what section of the Act that power is described and defined. He refers to sections 169, 171 and 232 of the Indian Companies Act. Section 169 does not apply, as it relates to a power to be exercised by the court to restrain proceedings against the company between the date of a petition for winding up and the date of an order for winding up. To apply this section to a voluntary liquidation we must regard the resolution of the company to wind up as equivalent to an order for winding up. The section, therefore, applies to an earlier stage of the proceedings than the present one. As regards section 171, it provides that no legal proceedings shall be proceeded with against the company except by leave of the court. This section appears to me to give the court power to grant leave, but not to give the court power to refuse leave. The latter power is unnecessary, because the section of itself imposes a statutory bar on proceedings against the company. The same remarks apply to section 232. It does not appear to me, therefore, that under section 215 of the Companies Act, strictly construed, the court could issue an order staying execution against the company. On the other hand there is authority for holding that section 193 of the English Companies Act will entitle a court in a case like this to stay execution proceedings. It was held, in the case of *Anglo Baltic and Mediterranean Bank* v. *Barber and Co.* (1), that there is a general practice of staying execution when a company is in voluntary liquidation for the reason that the execution, if allowed, would necessarily interfere with the distribution of the assets *pari passu*.

(1) (1924) 2 K. B., 410.

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Indeed, it was remarked by Lord SELBORNE in *Black and Co's Case* (1) that section 138 had the effect, where application was made to the court, of making applicable to voluntary liquidation all the powers of the court exercisable in the case of liquidation by the court. It follows that the interpretation given to section 193 by the English courts, and acted on invariably in practice, is that this section will give the court the power in a voluntary liquidation to stay further proceedings, though that is a power which in a compulsory liquidation does not exist, because the statute itself forbids execution being taken out. As section 215 of the Indian Act is in the same words as section 193 of the English Act, I consider that I am entitled to interpret it in the manner in which it has been interpreted by the courts in England.

For these reasons I consider that I have power to grant the application, and that it should be granted. Accordingly I direct that the relief, as prayed for in this application, be granted. This order is *ex parte*.

Application granted.

(1) (1872) 8 Ch. App., 254 (263).

APPELLATE CIVIL.

Before Mr. Justice Sulaiman and Mr. Justice Kendall.

GOSHAIN SHEO GHULAM PURI (PLAINTIFF) *v.* SHIAM LAL BHAGAT (DEFENDANT).* 1927 *November*, 29.

Math—Dasnami Goshains—Succession—Custom of the order —Alienations made by a mahant—*No presumption of property being trust property.*

According to the custom of the order of ascetics known as *Dasnami Goshains*, when once a person has been received into the order, no tie of relationship remains between him and his natural relations, and neither can succeed to the private property of the other. *Ramdhan Puri* v. *Dalmir Puri* (1), followed.

The rules of succession and devolution prevailing in a particular *math* are governed by the particular customs which apply to it.

Properties belonging to a *math* of the order of *Dasnami Goshains* had descended from *guru* to *chela* for several generations, but from 1874 to 1922 the *mahants* of the *math* had been exercising rights of private ownership over some of them by making usufructuary mortgages. There was no reliable evidence that the properties so alienated were trust properties. *Held*, that there was no legal presumption that these properties were trust properties, and such alienations could not be contested by a *chela* of the *guru* who had made them. *Indar Singh* v. *Fateh Singh* (2), distinguished.

THESE were two first appeals, Nos. 489 of 1924 and 141 of 1925, arising out of two distinct suits which were tried together. The plaintiff in both the suits claimed to be the disciple and the spiritual successor of the late Goshain Rup Puri, who was the *mahant* of the *math* of Sawdhari Puri. His case was that the deceased under two sale-deeds, dated the 21st of October, 1919, and the 13th of January, 1922, transferred the property in dis-

*First Appeal No. 489 of 1924, from a decree of Iftikhar Husain, Additional Subordinate Judge of Ballia, dated the 26th of September, 1924.

(1) (1909) 2 Indian Cases, 385. (2) (1920) I.L.R., 1 Lah., 540.

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pute in these cases to the contesting defendant and his wife in order to pay off certain amounts due to previous mortgagees; that these properties were part of the *math* property, and there was no legal necessity for their transfer. The defendant contested the claim by denying that the plaintiff was the *chela* of the deceased and denying that the property was trust property. There was also a plea that there was legal necessity for the alienation.

The court of first instance found most of the issues in favour of the plaintiff. It held that it was proved that the plaintiff was the lawful *chela* of deceased Goshain, that the sale was for consideration and without any legal necessity and that there was no force in the defendant's plea that the suit was barred by section 42 of the Specific Relief Act. It, however, held that it was not shown that the property belonged to the *math* or appertained to it and that it was trust property which the deceased could not transfer. On these findings it dismissed both the suits. The plaintiff appealed.

Dr. *Surendra Nath Sen*, Mr. *B. Malik* and Munshi *Ajudhia Nath*, for the appellant.

Pandit *A. P. Pande*, for the respondent.

THE judgement of the Court (SULAIMAN and KENDALL, JJ.), after reciting the facts as above, thus continued :—The main point before us is whether the properties covered by the sale-deeds were part of the trust property belonging to the *math*. There was some oral evidence led in the court below, consisting of statements of witnesses based mainly on hearsay to the effect that these properties belonged to the *math*.

[The evidence was discussed and found not sufficient to support the conclusion that the properties in question were in fact trust properties.]

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The learned advocate for the appellant has next contended that having regard to the fact that these properties have descended from *guru* to *chela* for several generations and that it is found that there is some nucleus of trust property, it should be presumed that the succession in the spiritual line took place because these properties were trust properties.

The *mahants* of this *math* are Puris and belong to one of the *Dasnami Goshains*, an order founded by the famous Shankaracharya. As pointed out in the case of *Ramdhan Puri* v. *Dalmir Puri* (1), before a person is taken into this order finally a number of ceremonies are performed, e.g. the taking off of *janeo*, the cutting off of his *chotia* (tuft of hair) and his performing his own *sradh*. All these indicate that his connection with his natural family and the secular life is altogether severed, and he belongs completely to this order. This would suggest that after he has been taken into the order finally no tie of relationship remains between him and his natural relations, and neither can succeed to the private property of the other. No authority has been cited before us to show that the private property which a *mahant* of this order might acquire can descend to his natural relations in preference to his spiritual *chelas*. *Primâ facie* one would imagine that the devolution of both the trust property and the private property would be in the spiritual line. It cannot be doubted that the rules of succession and devolution prevailing in a particular *math* are governed by particular customs applicable to it. It cannot be denied that a *mahant* might acquire private property with his own money, but such property also could not be inherited by the members of his natural family. In view of this matter there is no significance attached to the mere circumstance that the devolution of these properties has for several generations

(1) (1909) 2 Indian Cases, 385.

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been in the spiritual line. Great reliance has been placed by Dr. *Sen* on the case of *Indar Singh* v. *Fateh Singh* (1). But it was assumed in that case that there could be devolution on the natural heirs and it was then held that when it was shown that property had descended from one *mahant* to another *to the exclusion of the natural heirs* there was a presumption that the property was trust property. In this particular case we are unable to hold either on the evidence or on any authority that even the private property of any *mahant* could have been inherited by his natural heirs.

On the one hand we have the circumstance that these properties were in the possession of persons who were the *mahants* of this *math*, on the other we have the undoubted fact that between the years 1874 and 1922 there had been various transfers in the form of usufructuary mortgages made by the spiritual great-grandfather, grandfather and the father of the present plaintiff. These *mahants* had been treating these properties as their own properties, as if they had full disposing power over them. In the sale-deeds which are disputed in this case, Rup Puri asserted that these properties belonged to him and he was competent to transfer them. We have, therefore, the assertions of private ownership made by these *mahants* for so long a period, and we also have their course of conduct during all this time. In the absence of any evidence to the contrary it must be assumed that they were dealing with properties which belonged to them as owners. There is no presumption that they were trust properties and the plaintiff has therefore failed to prove that they were part of the trust properties belonging to the *math*. We accordingly dismiss these appeals with costs.

Appeal dismissed.

(1) (1920) I.L.R., 1 Lah., 540.

Before Mr. Justice Lindsay and Mr. Justice Banerji.

JAI NARAIN SINGH (PLAINTIFF) *v.* MUNNA LAL AND OTHERS (DEFENDANTS).*

1927
December,
2.

Hindu law—Co-widows—Separation—Alienation by one widow for legal necessity—Other co-widow's participation in alienation not necessary.

Two co-widows, having entered into possession of the property of their deceased husband, divided the same between them, and one of them alienated, for legal necessity, a considerable part of her share. *Held*, on suit by the next reversioner after their death, that the widow was competent to alienate for legal necessity even without the consent of her co-parcener. *Thakuramani Singh* v. *Dai Rani Koeri* (1), followed. *Valluru* v. *Sasapu* (2), dissented from.

THIS was a suit relating to certain zamindari property which had belonged to Tej Singh, who died on the 28th of January, 1873. Tej Singh left surviving him two widows, Musammat Lachhmin Kuar and Musammat Chhattar Kuar.

After the widows obtained possession of the estate of their husband, they came to an arrangement by which they partitioned the property for the purpose of convenient enjoyment, but in course of time—partly to pay off debts left by Tej Singh and partly to meet the expenses of litigation—the widows parted with most of the property.

Musammat Lachhmin Kuar executed two mortgages of the share in her possession, dated, respectively, the 19th of January, 1895 and the 12th of January, 1897. The first of these mortgages was in favour of one Chhatar Mal, who subsequently assigned his interest to Chhatar Singh. In this document it was stated that Rs. 300 had been taken from the mortgagee in order

*First Appeal No. 130 of 1925, from a decree of Nadir Husain, Second Additional Subordinate Judge of Aligarh, dated the 3rd of December, 1924.

(1) (1906) I.L.R., 33 Calc., 1079. (2) (1925) 49 M.L.J., 479.

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to pay the revenue due for the *kharif* instalment for 1302 *fasli*. It was also recited that a sum of Rs. 50 had been received by Musammat Lachhmin Kuar previous to the execution of the deed. By this document 4 *biswas* out of 5 *biswas* in the possession of Musammat Lachhmin Kuar in *mauza* Dhori were mortgaged by way of security. The second mortgage was for Rs. 500 in favour of the same mortgagee. In this document it was stated that she had received Rs. 271 in cash for food and that the balance Rs. 229 had been borrowed in order to pay the land revenue due for the *kharif* instalment.

Decrees were obtained on these two mortgages and the property mortgaged was brought to sale. After the death of the surviving widow, Musammat Chhatar Kuar, in April, 1922, the present suit was brought by the then next reversioner of Tej Singh, Jai Narain Singh, seeking to set aside the sales upon the ground that the mortgages upon which they were based had been executed without legal necessity and were not binding on the reversioners.

The court of first instance dismissed the suit, being of opinion that the mortgages impugned by the plaintiff had been executed for legal necessity and were binding on the estate.

The plaintiff appealed.

Babu *Piari Lal Banerji*, for the appellant.

Dr. *Kailas Nath Katju*, Munshi *Panna Lal* and *Pandit Shiam Krishna Dar*, for the respondents.

THE judgement of the Court (LINDSAY and BANERJI, JJ.), after reciting the facts, and agreeing with the court below that the alienations made by Musammat Lachhmin Kuar were made for legal necessity and that the circumstances showed that Musammat Chhatar Kuar was a consenting party, thus continued :—

We come now to the point of law which was raised here but which was not raised in the court below. In-

deed the point is not taken in the memorandum of appeal, but the question being one of law we thought it proper to hear the learned counsel on both sides.

Mr. *Piari Lal Banerji* put forward the argument that the alienation made by Musammat Lachhmin Kuar, even if it was found to have been made for legal necessity, could not bind the reversioners unless the co-widow joined in the alienation. We have already indicated our opinion that from the circumstantial evidence it must be taken that Musammat Chhatar Kuar was a consenting party to this alienation, although it is certainly true that she did not join in executing the two mortgage-deeds of 1895 and 1897, respectively.

In support of his argument Mr. *Piari Lal Banerji* relied on a recent ruling of the Madras High Court in *Valluru* v. *Sasapu* (1). In this case the learned Judges, after reviewing all the authorities which deal with the legal position of co-widows, have set out six propositions which they have deduced from the previous authorities. Mr. *Piari Lal Banerji* relies on the fifth and sixth of these propositions. The fifth proposition is thus stated at p. 486 of the judgment :—

"Except for the limited purposes mentioned above, that is, during the lifetime of the alienee in a partition of the first kind or during the lifetime of all the co-widows in a partition of the second kind, there can be no alienation by a widow of her interest; and whether there is necessity or not, an alienation by one co-widow cannot bind the reversioner."

The sixth proposition is stated in the following language :—

"If an alienation for necessity is to bind the reversioners all the co-widows must join in it."

We are not prepared to accept either of these propositions as stated. We have examined for ourselves all

(1) (1925) 49 M.L.J., 479.

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the case-law on this subject, beginning with *Myna Baee's* case (1). It must be taken as well established that two co-widows succeeding to the estate of a deceased husband take the property as co-parceners in the strictest sense and, as such, the general rules regarding alienation would be that there could be no alienation by one without the consent of the other.

The cases fall into two classes. In some of them the contest has been between the alienee of one co-widow and the surviving co-widow. In others, there has been a claim put forward by the reversioner against the alienee after the death of both the widows.

It is necessary to keep these two classes of cases distinct. We need not enter into a discussion of the cases in so far as they relate to claims by the survivor of two co-widows against the alienee of the other co-widow. We are dealing here with a claim made by the reversioner after the death of both the widows. Where there is a single Hindu widow the reversioner is bound by any alienation made by her of her husband's estate for legal necessity. It follows, therefore, that if there are two widows and they both join in a sale or mortgage to raise money for legal necessity, the reversioners are bound, and they are bound because of the existence of a necessity which justifies the alienation. How then does the case stand where the two widows have separated for purposes of conveniently enjoying the estate left by the husband? Is it to be said that if one of the widows, acting under the pressure of legal necessity, is obliged to alienate a portion of the estate in her possession, the reversioner is not to be bound? It seems quite clear that the existence or non-existence of legal necessity cannot depend upon the consent of the other widow. Take the case of two co-widows, one of whom has three daughters whom she is obliged to marry; her co-widow has no daughters. Or

(1) (1867) 11 Moo. I.A., 487.

take again the case of one co-widow who is in easy circumstances and who can depend upon her own relations for support in a time of distress, while the other widow has no such resources at her disposal. Is it to be said that because the widow who is well-to-do refuses her consent to an alienation made by the other widow in circumstances which render the alienation necessary, the estate is not to be bound? We do not think that any authority for such a proposition is to be deduced from the reported cases. It is no doubt true that co-widows succeeding to the estate of their husband are undivided co-parceners and the general rule, of course, is that one co-parcener is not entitled to alienate without the consent of the other. It is also true that no arrangement made by the widows for the separate enjoyment of portions of the estate can destroy their legal position as co-parceners. But is it correct to say that in no case can a co-parcener alienate without the consent of the other? The Hindu law does not say so, and in this connection we would refer to a passage in the *Mitakshara*, chapter I, section I, clauses 27 and 28. Clause 27 deals with the general law regarding the rights of disposal by one co-parcener, but clause 28 declares an exception on that general rule and lays down that even a single individual may conclude a donation, mortgage or sale of immoveable property during a season of distress for the sake of the family and especially for pious purposes.

If that is the Hindu law to be applied to the case of co-parceners, there can be no reason in principle why it should not be applied to two co-widows, who, according to all the decided cases, are co-parceners in the strictest sense. and it seems to us, therefore, that if there are two co-widows enjoying their husband's estate as co-parceners, one of them can, under the exception to the rule we have just quoted, conclude a donation, mortgage or sale of immoveable property during a season of distress "for

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the sake of the family and especially for pious purposes." That being so, we are not prepared to accept the argument that even where legal necessity exists an alienation by one co-widow will not bind the estate unless the other co-widow joins in the alienation. The proposition has, in our opinion, been laid down far too broadly and the exception contained in the *Mitakshara*, chapter I, clause 28, has not, in our opinion, been kept in mind. In the course of the discussion the case of *Thakurmani Singh* v. *Dai Rani Koeri* (1) has been referred to. That, in our opinion, supports the conclusion at which we have arrived. In that case it was held that a mortgage by one widow without the consent of the other was binding on the reversioner to the extent that the debt secured by the mortgage was incurred for legal necessity.

Holding, therefore, that there was legal necessity in this case and being of opinion that Musammat Lachhmin Kuar was entitled for legal necessity to alienate this property without the consent of her co-widow Musammat Chhatar Kuar, we are of opinion that the estate is bound. But, as we have said, it must be taken that Chhatar Kuar did consent to this alienation, and while it is true that she did not actually join as a party in the two mortgages executed by Lachhmin Kuar, we hold that it was not necessary for the purpose of binding the estate in the hands of the reversioners that she should do so.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(1) (1906) I.L.R., 33 Calc., 1079.

FULL BENCH.

Before Mr. Justice Sulaiman, Mr. Justice Banerji and Mr. Justice Ashworth.

IN THE MATTER OF MAKUND SARUP.*

1927 *December,* 2.

Act No. XI of 1922 *(Indian Income-Tax Act), sections* 2(1) *(a),* 3 *and* 4—*"Agricultural income"—Money-lender taking a usufructuary mortgage of agricultural land and immediately leasing it back to the mortgagor—Rent not liable to income-tax.*

If a person carrying on a money-lending business lends money in the course of such business on the security of lands of which he takes a usufructuary mortgage and if he immediately leases those lands back to the mortgagor with a stipulation for fixed annual payments which amount to a definite percentage on the sum advanced, *held*, that these annual payments should be excluded from the assessment of the profits and gains of his business, as being "agricultural income" within the meaning of section 2(1)(*a*) of the Indian Income-Tax Act, 1922. *Partington* v. *Attorney-General* (1), referred to.

THIS was a reference under section 66 of the Indian Income-tax Act of 1922. One Munshi Makund Sarup, in submitting his income-tax returns for the years 1925-26 and 1926-27, did not include the income derived by him from certain usufructuary mortgages in his favour. The income-tax officer on this discovery came to the conclusion that such income was derived from money-lending business and was not derived from landed property and was, therefore, liable to income-tax. The assessee appealed to the Assistant Commissioner, who, relying upon a Full Bench decision of the Madras High Court in the case of *Subramanya Sastrigal* (reported in Mr. P. R. Srinivasam's Reports of Income-tax cases, Volume II, part III, p. 152), dismissed the appeal. The assessee then

*Miscellaneous Case No. 605 of 1927.
(1) (1869) L.R., 4 E. and I. App., 100.

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requested the Commissioner to refer the question of law which arose in this case to the High Court. The Commissioner made the reference asked for and formulated the question for consideration in the following words :—

"If a person carrying on money-lending business lends money in the course of such business on the security of lands of which he takes a usufructuary mortgage and if he immediately leases those lands back to the mortgagor with a stipulation for fixed annual payments, which amount to a definite percentage (8½ in the case cited above) on the sum advanced, should those annual payments be excluded from the assessment of the profits and gains of his business, as being agricultural income within the meaning of section 2(1)(*a*) of the Indian Income-Tax Act, 1922"?

THE reference was laid before a Bench of three Judges for disposal.

Sir *Tej Bahadur Sapru*, Munshi *Narain Prasad Asthana* and Munshi *Shiva Prasad Sinha*, for the applicant.

Pandit *Uma Shankar Bajpai*, for the Crown.

THE judgement of SULAIMAN, J., after stating the facts as above, thus continued :—

The main question underlying this reference appears to be whether, if the case is not that of a pure usufructuary mortgage, but one where there is a simultaneous grant of a lease of the mortgaged property to the mortgagor, so that the net result is that the mortgagee obtains regular cash payments representing interest on his capital, the latter is exempted from liability to pay income-tax.

Section 3 of the Act, in the first place, makes all income, profits and gains liable to income-tax, but section 4 contains an exemption clause which, among other matters, provides that the Act shall not apply to "agricultural income." Now agricultural income is defined in section 2, sub-clause (1)(*a*) as being any rent or revenue derived from land which is used for agricultural

purposes and is either assessed to land revenue in British India or subject to a local rate assessed and collected by officers of the Government as such. And under clause (*b*) agricultural income is also income which is derived from such lands by agriculture. These two clauses undoubtedly indicate that the agricultural income can either be derived by a person who is actually carrying on agriculture or cultivation, or it may represent the rent received by him from land which is used for agricultural purposes, though the person who receives the rent may not himself be cultivating that land.

Sulaiman, J.

It seems necessary to clear the ground by first considering the question whether a pure usufructuary mortgagee is liable to pay income-tax. The learned advocate for the Crown has laid great stress on the assumption in the reference that the present assessee is carrying on money-lending business and that it was in the course of such business that he has invested his capital, the return of which is his income from these lands. It is, therefore, his contention that his gains are gains of business and not rent. It may be conceded that the profits made by a usufructuary mortgagee, even though arising out of the land mortgaged to him, are gains of his business, if he has taken this mortgage in the course of his business as an investment. But this concession does not necessarily involve an admission that such gains of business are not rent within the meaning of section 2, so as to exempt him from liability to pay income-tax. The money which actually comes into the hands of a pure usufructuary mortgagee may be rent received direct from tenants or may be the profits from actual cultivation. It is, therefore, either rent derived from land which is used for agricultural purposes, or is income derived from land by agriculture. In either case it is agricultural income. It may also happen to be gains of his business, but that

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does not necessarily take him out of the exemption clause. I am, therefore, clearly of opinion that in the case of a pure usufructuary mortgagee there is no liability to pay income-tax. The position of such a mortgagee is very much analogous to that of a proprietor who is entitled to have his name recorded in the revenue papers and is for the purposes of revenue courts treated as a co-sharer. He is also entitled to sue for arrears of rent, eject tenants and to enter into possession and cultivate the land himself as the proprietor himself could have done. He is further liable to pay Government revenue, which a simple mortgagee is not. His position is analogous to that of a lessee who takes a lease of agricultural lands, say for a fixed period on payment of some *nazrana*. The latter class of transferees cannot be liable to the payment of income-tax. It is thus clear that the income received by a usufructuary mortgagee is really agricultural income, though it just happens to be also a return for the capital invested by him. To hold that he is liable to pay both Government revenue and income-tax would be imposing a double taxation, which is against the policy of the Act.

Coming to the next question, whether, even if a usufructuary mortgagee is not liable to pay income-tax, a mortgagee, who at the same time leases back the mortgaged land to the mortgagor with a stipulation that there would be a fixed annual payment calculated on the basis of the rate of interest agreed upon between the parties, is in a worse position. It seems to me that to hold that such a person is liable to pay income-tax would amount to holding that the transaction is not that of a usufructuary mortgage but almost a simple mortgage. It is impossible to hold in this case that the transaction was not that of a usufructuary mortgage. No doubt the mortgage-deed and the lease were executed on one and the same date and the cross-references in the two documents

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indicate that the whole transaction was settled at one time. Nevertheless there are certain distinguishing features which make the position of the present usufructuary mortgagee quite distinct from what it would have been if he had taken a purely simple mortgage. He has under the lease the right to recover rent through the revenue court, which, very often, is a speedy remedy. He has also the security of the fixed amounts being paid to him regularly year after year, with the option of entering into possession on the default of such payment. If he enters into possession after the ejectment of the mortgagor he is entitled to cultivate lands himself or to let the lands to tenants and receive profits from them. Under these circumstances it seems impossible to hold that the position of the assessee is that of a purely simple mortgagee who is liable to pay income-tax.

With regard to the Full Bench case of the Madras High Court relied upon by the Assistant Commissioner, I need only say that the judgement is very brief and contains no reasons in support of the view urged on behalf of the Crown. The learned Judges appeared to have assumed that the finding of fact arrived at by the Commissioner who had made the reference necessarily involved the result of the reference being answered in the negative. Perhaps they meant to assume that the finding of the Commissioner, that in that case the transaction was merely a device to evade the payment of the income-tax and was not in reality a transaction of usufructuary mortgage and the income was not derived from the land but from a business of the mortgagee, was a finding of fact which could not be disturbed. I am not saying that the remarks of the income-tax officer did in reality amount to a finding of fact. But the learned Judges appear to have treated it as such, and on that assumption held that the answer must be in the negative.

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I am, therefore, of opinion that the answer to the question should be in the affirmative, and the annual payments should be excluded from assessment.

BANERJI, J.—I agree. I am of opinion that upon the facts of the present case the income which is derived by the assessee is income which comes within the definition of agricultural income in section 2 (1) of the Income-tax Act. The mere fact that the usufructuary mortgagee has granted a lease to the mortgagor, in my opinion, does not alter what in law is the effect of the document executed by the mortgagor in favour of the mortgagee. It still remains a usufructuary mortgage and in the case of a usufructuary mortgage, although it would come within the definition of business. it is exempted from the operation of the Act by reason of the definition of agricultural income in section 4, which says that any income derived from any rent from land which is used for agricultural purposes is exempted from taxation. In my opinion, in no case can the profit which the usufructuary mortgagee receives be called anything but rent derived from land used for agricultural purposes.

ASHWORTH, J.—I concur. The owner of agricultural land who leases land is admittedly not liable to income-tax on the rent received. A usufructuary mortgagee is, for the time being, the owner of agricultural land, and, so long as the mortgage subsists, he is in the same position as an owner. The Government Advocate attempted to distinguish the rent paid to an absolute owner from that paid to a usufructuary mortgagee, by drawing a very subtle distinction. His argument was that a person purchasing agricultural land must pay the full market price, while a person taking a usufructuary mortgage of that land will never advance the whole market price. Consequently, by reason of the mortgage, he obtains higher profits on the money invested than a pur-

chaser would, and the difference should be regarded as a profit from the business of money-lending. But the price paid for the acquisition of land cannot affect the character of the land acquired. A usufructuary mortgagee is, like the owner of agricultural land, free from payment of income-tax, because the land is liable to land revenue. My researches into the history of land revenue have inclined me to believe that it is in reality a rent claimed by Government but collected under the procedure applicable to a tax. The exception in section 2 of the Income-tax Act, however, proceeds on a different assumption. It is clear that the exemption is made on the ground that the owner, temporary or otherwise, of agricultural land should not be liable to two forms of taxation, land revenue and income-tax.

Ashworth, J.

If we concede that a usufructuary mortgagee is not liable for income-tax in respect of the mortgaged land, provided that the land is agricultural, then the question referred to us amounts to this. Does it make any difference when by means of a lease, forming a single transaction along with the mortgage, the mortgagee restores possession to the mortgagor, and himself, in the form of rent, receives a sum equal to the land revenue plus interest at a definite rate? The answer to this depends on whether the result of the two deeds could have been effected *in toto* by a simple mortgage-deed. My learned brother has shown that this was not the case. The result of the execution of the two deeds is fraught with consequences that would not attach to the execution of a simple mortgage-deed. One transaction differs from the other not merely in form but in substance.

The Commissioner of Income-tax has not suggested in his reference to this Court that the transaction of a usufructuary mortgage and a lease was fraudulent, or colourable, or that the legal consequence of the execution

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of both deeds can be avoided on this ground; but he has referred to a decision of the Madras High Court in which this point is raised.

There can be no doubt that the decision by the Madras High Court was reasonably invoked by the Income-tax Commissioner. It appears, therefore, desirable to examine that decision, both to see how far it is on all fours with the present case, and, if so, on what grounds dissent from it should be expressed. The main distinction to my mind between the reference to the Madras High Court and this reference is that there was undoubtedly forwarded to the Madras High Court an expression of opinion, treated by the Madras High Court as a finding of fact, which is wanting in the reference to this Court. In that reference the Income-tax Commissioner had stated :—

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"The income received or receivable by the capitalist is not income derived from land but income derived from the business of money-lending. It appears to me that taxing authorities and courts in such a case as this must look to the substance of the transaction. The source of the petitioner's income is his money-lending business, and the mortgage and lease back are merely devices adopted partly to protect his capital and partly to secure his business from liability to income-tax. It is evident from the drafting of sub-section 2(1) of the Income-tax Act (XI of 1922), that the object of exemption of agricultural income is to avoid subjecting the income from land to double taxation, once in the form of land revenue and once in the form of income-tax."

On this reference the judgement of the Madras High Court was as follows :—

"The finding of fact in this case necessarily involves that the question propounded in the reference should be answered in the negative."

Now the question of fact found by the Madras High Court was presumably that the income assessed was not derived from land. If this finding had been stated with-

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out reasons, it would clearly have been a simple finding of fact and would have precluded the interference of the High Court. It appears that the Madras High Court treated the reference as containing such a finding of fact, and so it did not discuss the question of law referred to us. In the present reference, on the contrary, all questions that can be raised are left open.

Ashworth, J.

It appears, however, to me desirable to state that if the terms of the reference and the decision of the Madras High Court are rightly reproduced in the publication placed before this Court, what was submitted to the Madras High Court was not merely a finding of fact but a finding of fact based upon an interpretation of the Income-tax Act and on a certain proposition of law, from both of which it is necessary to express dissent. The Act does not make the distinction drawn in that reference between income derived from business and income derived from land. The business of money-lending may bring in an income which is exempt from income-tax on the ground that it is derived from agricultural land. Nor again can the taxing authorities avoid an implication arising from the form of a transaction on the ground that, except for a desire to escape income-tax, the transaction would have taken a different form, which is what is meant in that reference by "looking at the substance of the transaction." It is not unlawful to avoid, by any means not forbidden by law, rendering oneself liable to the payment of income-tax, though it is an offence by false return or by concealment to evade payment of income-tax. In this connection I would quote the remarks of Lord CAIRNS on the interpretation of a Taxing Statute :—

"If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring

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the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any Statute, what is called an equitable construction, certainly such a construction is not admissible in a Taxing Statute, where you can simply adhere to the words of the Statute:" *Partington* v. *Attorney-General* (1).

For the above reasons I would concur in answering the question propounded in the affirmative.

BY THE COURT.—The order of the Court is that the annual payments made to the mortgagee in the circumstances mentioned in the reference are excluded from the assessment of the profits and gains of his business, as being agricultural income. It would appear that this case had three hearings. We fix Rs. 100 per day as fee for both sides. The assessee will have his costs from the Crown.

Reference answered in the affirmative.

Before Mr. Justice Sulaiman, Mr. Justice Banerji and Mr. Justice Ashworth.

1927 *December*, 2.

IN THE MATTER OF SHIAM SUNDAR LAL, SHANKAR LAL.*

Act No. II of 1899 *(Indian Stamp Act), section* 57(1), *sub-clause* (b)—*Stamp—Agreement—Document containing an agreement to pay interest, but also containing items constituting a two-sided account.*

The first portion of a document, called a *sarkhat*, contained an agreement to pay interest, and was signed by two persons. Below their signatures was an entry of Rs. 500 as having been advanced to these persons on the same date, and then followed entries of a number of items on the credit and debit sides respectively, which were neither totalled nor signed. *Held*, on a reference by the Board of Revenue, that the document did not constitute more than one agreement and was properly stamped with a stamp of the value of eight annas.

*Miscellaneous Case No. 845 of 1927.

(1) (1869) L.R., 4 E. and I. App., 100.

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THIS was a reference under section 57 (1), sub-clause (*b*), of the Indian Stamp Act of 1899, from the Secretary, Board of Revenue, United Provinces. The facts which gave rise to the reference are set forth in the judgement of the Bench before which it was laid for disposal.

Pandit *Uma Shankar Bajpai*, for the Crown.

SULAIMAN, BANERJI and ASHWORTH, JJ. :—This is a reference under section 57(1), sub-clause (*b*), of the Indian Stamp Act of 1899. The facts as stated in the reference are that a document, called a *sarkhat*, was executed by Messrs. Shiam Sundar Lal, Shankar Lal, agreeing to pay interest at Rs. 1-4-0 per cent. per mensem. The top portion, which contained the agreement to pay interest, was signed by these two persons. Below their signatures there was a first entry of Rs. 500 as having been advanced to these men on the same date. Then followed entries of a number of items on the credit side and also entries of a number of items on the debit side. These, however, were neither totalled nor signed again. The document bore a stamp of eight annas. The impounding officer seems to be of opinion that every entry of borrowing is a separate agreement and ought to be stamped separately.

The document is very peculiar and is, on the facts stated in the reference, not like an ordinary mahajan's receipt written by the creditor and handed over to the debtor in order to be kept by him as a proof of the payment. As the facts are stated, the entries on both the sides of this *sarkhat* are made by the debtors, Shiam Sundar Lal, Shankar Lal, themselves. The reference does not mention whether they themselves kept the document or whether it was handed over to the creditors. It is, however, clear that there were various borrowings made on different dates.

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There can be no doubt that the top portion of the document amounted to an agreement which required a stamp duty of eight annas. So far as that portion is concerned, the document is sufficiently stamped. As regards the entries, other than the first entry of Rs. 500, it is difficult to hold that each of them constituted a separate agreement in itself. Under section 17 of the Indian Stamp Act, instruments chargeable with duty which are executed are required to be stamped before or at the time of their execution. The word "executed" has been defined in section 2, sub-clause (12), as meaning "signed, with reference to instrument." It is clear that none of the other entries was signed by the debtors. It cannot, therefore, be said that they were separate agreements executed by the debtors on various dates. The impounding officer seems to think that the signatures of the executants below the top entry would govern all the entries that follow underneath those signatures. We are unable to accept this view. In order to be so many different agreements, they should have been separately "executed," which cannot be the case here when there is only one set of signatures. In our opinion, therefore, the document does not constitute more than one agreement, and is not understamped on that ground. It is unnecessary for us to consider the further question whether the other entries amount to receipts within the meaning of section 2, sub-clause (23), which do not require the signature of any person. The reference does not state to whom this document was handed over and there are not sufficient materials before us to come to any conclusion as to whether each entry amounted to a note, memorandum or writing signifying or importing an acknowledgment within the meaning of section 2, sub-clause (23).

Our answer to the reference is that it does not constitute more than one agreement.

Reference answered.

APPELLATE CIVIL.

Before Mr. Justice Mukerji and Mr. Justice Ashworth.

LACHMAN (DECREE-HOLDER) *v.* JARBANDHAN (JUDGEMENT-DEBTOR).* 1927 December 5.

Civil Procedure Code, section 60—Execution of decree—"Debts"—Attachment—Debts not yet due.

The word "debts" as used in section 60 of the Code of Civil Procedure applies only to debts actually due: it cannot include debts, e.g., rent, which may become due in the future. Rent which has not yet become due can not be attached either as a debt or as an actionable claim. *Sher Singh* v. *Sri Ram* (1), and *Webb* v. *Stenton* (2), referred to.

THIS was a second appeal arising out of an objection made by a judgement-debtor to the attachment of certain rent alleged to be due to him as an occupancy tenant from his sub-tenant. At the date of the attachment, the rent of which attachment was made had not become payable by the sub-tenant, the period in respect of which the rent was attached being still incomplete. The judgement-debtor accordingly objected that this rent was not covered by the provisions of section 60 of the Code of Civil Procedure. The first court held that as the rent had become due at the date when the objection was heard, it was immaterial that the attachment was made before the rent had become due. It also held that there was no reason why rent could not be attached in advance, i.e., before it became due. In appeal, the District Judge upheld the contention of the judgement-debtor on the ground that on the authority of *Sher Singh* v. *Sri Ram* (1) profits not yet accrued due were not susceptible of attachment.

*Second Appeal No. 1508 of 1926, from a decree of D. C. Hunter, District Judge of Allahabad, dated the 15th of July, 1926, reversing a decree of Rup Kishen Agha, Subordinate Judge of Allahabad, dated the 17th of April, 1926.

(1) (1908) I.L.R., 30 All., 246. (2) (1883) 11 Q.B.D., 518.

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The decree-holder appealed.

Munshi *Haribans Sahai*, for the appellant.

Babu *Piari Lal Banerji*, for the respondent.

THE judgement of ASHWORTH, J., after stating the facts as above, thus continued :—

In this appeal it is submitted that this case was not relevant to the present facts. In that case it was clearly held that what was attached was a right to certain profits which might never become due, whereas in the present case there can be no question that at the date of the attachment there was a certainty that the rent would become due. Reference, however, in that decision was made to the English case of *Webb* v. *Stenton* (1). In that case the Queen's Bench held in effect that a debt involves (*a*) an obligation incurred by the debtor, and (*b*) a liability on the part of the debtor to pay for that obligation at a certain date. Until the obligation had been fully incurred, there is no debt. "Accruing" did not mean that the obligation was incomplete, but merely that the date for payment had not arrived. "Debitum in presenti, solvendum in futuro." Rent in respect of a period still in existence is thus not a debt at all, as the obligation is not complete.

This decision equally disposes of the argument that this rent could be attached, if not as a debt, still as saleable property, that is to say, "an actionable claim". An actionable claim is "a claim to a debt, existent, accruing, conditional or contingent". The last four words do not alter the situation, if there is no debt.

It has been suggested that the "saleable property" is not the rent, but the title to recover it for the period in question. A title (unlike a debt) accrues when the instrument creating it has been executed. But it is not the title that the decree-holder purported to attach.

(1) (1883) 11 Q.B.D., 518.

Moreover, an occupancy tenant cannot transfer his title except by a sub-lease for five years (in which case he gets the rent and his landholder is not prejudiced) under sections 23—34 of the Tenancy Act.

For these reasons I hold that the lower appellate court was correct in its decision, and would dismiss the appeal with costs.

MUKERJI, J.—I entirely agree with my learned brother that the word "debts" as used in section 60 of the Code of Civil Procedure must be confined to a debt in the ordinary sense of the word, that is to say, an existing debt. It appears to me that the several articles that have been declared by the opening portion of section 60 as liable to attachment and sale have been given only by way of an illustration. The important words are, "all saleable property, moveable or immoveable, belonging to the judgement-debtor . . . . ;" these are liable to be attached and sold. It is only by way of illustration that the words, "lands, houses, etc." have been added. If this view of mine be correct, the word "debts" could have been used only as illustrating what is liable to be attached and sold. A person may be a debtor under a bond, although the money due under the bond does not accrue payable till a future date; for the liability is there to pay. In the present case, it cannot be said that at the date of the attachment the sub-lessee was "in arrear" to the occupancy tenant, the judgement-debtor. If the sub-lessee was not in arrear, it cannot be said that there was a debt due by him to the occupancy tenant. If at the date of the attachment, the sub-lessee was dispossessed, he could not be called upon to pay. His liability was not complete till he had held for the required period.

As regards the question whether the right to recover the rent could or could not be attached and sold under

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the latter portion of section 60 of the Code of Civil Procedure, I need not add anything to what has fallen from my learned brother.

BY THE COURT.—The appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Sulaiman and Mr. Justice Kendall.

1927 *December, 5.*

MUHAMMAD NAZIR AND ANOTHER (DEFENDANTS) *v.* ZULAIKHA BIBI (PLAINTIFF).*

Act No. IX of 1908 *(Indian Limitation Act), schedule I, articles* 91 *and* 120*—Limitation—Difference between a deed which is null and void and one which is good but voidable.*

Where a deed is *ab initio* null and void, there is no necessity for a person who considers himself aggrieved thereby to come to court promptly and have the deed actually cancelled or set aside, but where a deed is good but is voidable at the option of the party aggrieved, he must come to court within three years to have it set aside.

A suit for a declaration that a transaction embodied in a particular deed was, from its very inception, a sham transaction is to be distinguished from a suit for cancellation of the deed and does not fall within the purview of article 91 of the first schedule to the Indian Limitation Act, 1908. *Sangawa* v. *Huchangowda* (1), *Petherpermal Chetty* v. *Muniandy Servai* (2), and *Jagardeo Singh* v. *Phuljhari* (3), followed.

THE facts of this case sufficiently appear from the judgement of the Court.

Dr. *Surendra Nath Sen* and Mr. *B. Malik*, for the appellants.

Maulvi *Mukhtar Ahmad* and Pandit *Brijmohan Lal Dave*, for the respondent.

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*Second Appeal No. 1282 of 1925, from a decree of D. C. Hunter, District Judge of Allahabad, dated the 3rd of April, 1925, confirming a decree of V. Mehta, Subordinate Judge of Allahabad, dated the 19th of May, 1924.

(1) (1923) I.L.R., 48 Bom., 166. (2) (1908) I.L.R., 35 Calc., 551.
(3) (1908) I.L.R., 30 All., 375.

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SULAIMAN and KENDALL, JJ. :—This is a defendants' appeal arising out of a suit for a declaration that a sale-deed, dated the 26th of August, 1918, was null and void, and that the defendants had not acquired any right thereby. The document purported to be a sale-deed for consideration executed by the plaintiff in favour of the defendants. The plaintiff's allegation was that it was a wholly fictitious document, never intended to pass title in the lifetime of the plaintiff, and that no consideration had in fact, passed, and that the document was void *ab initio*. Both the courts below have decreed the claim. The only question of law which was raised in the court below, and which is raised before us again, is the question of limitation. The defendants pleaded that the suit was governed by article 91 of the Limitation Act and ought to have been brought within three years of the date when the plaintiff had knowledge of the facts. The court below has held that the article applicable is the general article, namely, 120 of the Limitation Act, as the suit was really a suit for declaration of title. The learned Judge has relied on the case of *Jagardeo Singh* v. *Phuljhari* (1), though he has stated that he is not able to appreciate the difference between the deeds which are void and the deeds which are voidable. The difference is patent, and has been explained in numerous cases. Where a deed is null and void, there is no necessity for the party to come to court promptly and have the deed actually cancelled or set aside. Where, however, a deed is good but is voidable and can be avoided at the option of the party aggrieved, he must come to court within three years to have it set aside. As pointed out by this Court in the case referred to above, a suit for a declaration that a transaction embodied in a particular deed was from its very inception a sham transaction is to be distinguished from a suit for cancellation of the deed. The

(1) (1908) I.L.R., 30 All., 375.

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former kind of suit does not fall within the purview of article 91 of the schedule to the Indian Limitation Act. This view has been consistently accepted by all the High Courts and by their Lordships of the Privy Council. We may refer to the case of *Sangawa* v. *Huchangowda* (1) and the case of *Petherpermal Chetty* v. *Muniandy Servai* (2).

The appeal has, in our opinion, no force and is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Mukerji and Mr. Justice Ashworth.

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RAM RUP TELI (PLAINTIFF) *v.* KHADERU TELI AND OTHERS (DEFENDANTS).*

Civil Procedure Code, section 66—Joint Hindu family—Purchase at execution sale of property by father in the name of a stranger—Partition—Suit by member of family for possession of property so purchased.

The father in a joint Hindu family made a purchase at an execution sale of certain property in the name of one *K*, who was an outsider. Subsequently, the family property was partitioned and the particular piece of property in question fell to the share of *R*. *R*, being resisted in his attempt to obtain possession from *K*, brought a suit to have his right established and for possession. *Held*, that the suit was barred by section 66 of the Civil Procedure Code. *Baijnath Das* v. *Bishan Devi* (3), followed. *Nataraja Mudaliyar* v. *Ramasami Mudaliar* (4), *Bodh Singh Doodhooria* v. *Gunesh Chunder Sen* (5), *Narain Dei* v. *Durga Dei* (6), and *Ganga Sahai* v. *Kesri* (7), distinguished.

The plaintiff sued Khaderu Teli and several others on the allegation that he himself and the defendants

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*Second Appeal No. 994 of 1925, from a decree of K. G. Harper, District Judge of Benares, dated the 14th of February, 1925, reversing a decree of Ali Ausat, Subordinate Judge of Jaunpur, dated the 5th of December, 1924.

(1) (1923) I.L.R., 48 Bom., 166.
(2) (1908) I.L.R., 35 Calc., 551.
(3) (1921) I.L.R., 42 All., 711.
(4) (1922) I.L.R., 45 Mad., 856.
(5) (1873) 12 Beng., L.R., 317.
(6) (1913) I.L.R., 35 All., 138.
(7) (1915) I.L.R., 37 All., 545.

other than Khaderu Teli once formed a joint Hindu family. While the family was joint, Bihari Lal, the father of the defendant No. 2, as the then head of the family, purchased the property in suit, at an auction sale in execution of a decree, in the name of the defendant No. 1. Bihari Lal had made similar purchases in the names of people other than members of the family, but no dispute arose in respect of these properties. There was a partition in the family, and the property in suit fell into the share of the plaintiff. The plaintiff was resisted by the ostensible auction-purchaser, the defendant No. 1, and he therefore, brought this suit to have his right established and for possession.

The defence of Khaderu was that he was the real purchaser of the property, and that section 66 of the Code of Civil Procedure barred the suit.

The trial court held that section 66 of the Code of Civil Procedure was no bar to the maintenance of the suit, and that as a matter of fact Khaderu was not the real purchaser but that the purchase was made for the family by Bihari Lal, the head of the family.

There was an appeal by Khaderu, and the learned District Judge was of opinion that the plaintiff had failed to establish that Khaderu was not the real purchaser, but the real purchaser was the family consisting of the plaintiff himself and the defendants other than the defendant No. 1. The District Judge did not express any opinion as to the applicability or otherwise of section 66 of the Code of Civil Procedure. He accordingly allowed the appeal and dismissed the plaintiff's suit. The plaintiff appealed.

Pandit *Uma Shankar Bajpai* and Pandit *Narmadeshwar Prasad Upadhiya*, for the appellant.

Dr. *Kailas Nath Katju* and Pandit *Ambika Prasad Pande*, for the respondents.

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THE judgement of MUKERJI, J., after stating the facts as above, thus continued :—

In this Court I have heard arguments on section 66 and am of opinion that it completely bars the suit.

There is no allegation of fraud in the plaint. There was no allegation of fraud in the lower appellate court, and there is no allegation of fraud in the grounds of appeal filed in this Court. The simple position is this. The head of the family made the purchase on behalf of the family, but allowed the name of Khaderu to be entered in the sale certificate. The question is whether, in the circumstances, the plaintiff's suit is barred.

The plaintiff must accept the position that the purchase was made on his behalf as well as on behalf of the other members of the family. If he does not take up this position he has no title to the property at all. Therefore, he cannot escape from the position that the purchase was made on his behalf, although it was made through the agency of the then head of the family, Bihari Lal. The case, therefore, falls exactly within the language of section 66 of the Code of Civil Procedure.

A large number of rulings have been quoted before me. One of the cases quoted is *Narain Dei* v. *Durga Dei* (1). In this case, a widow in possession of her husband's property made a purchase at an auction sale, and employed the defendant's name as the certified purchaser. On her death, her daughter sued for recovery of the property. The question arose whether the suit was maintainable. Two learned Judges of this Court were of opinion that as the daughter, the plaintiff in the case, did not claim under her mother but under the last male owner, her father, section 66 of the Code of Civil Procedure had no application. I express no opinion on the correctness or otherwise of this statement of law. I

(1) (1913) I.L.R., 35 All., 138.

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might, however, point out that, so long as the widow lived, she represented the entire estate, and it was her purchase that was giving title to her daughter. In the circumstances it might be argued, with some force at any rate, that the daughter was claiming through her mother. However, as I have said, that case is entirely different from the case before me. Here the purchase was made for the plaintiff as one of the members of the family. The case of *Baijnath Das* v. *Bishan Devi* (1) is directly in point. In that case the father of the joint Hindu family made a purchase in the name of the defendants. The father having died, one of the sons sued for a declaration that the property belonged to himself and his brother. It was held that the suit was not maintainable. This case was dissented from in *Nataraja Mudaliyar* v. *Ramasami Mudaliar* (2). That was a partition suit in which the *benamidar*, the head of the family who had made the purchase in the name of the *benamidar*, and other members of the family were parties. The question arose whether the suit was maintainable against the *benamidar*, and it was held that it was. That case is easily distinguishable, though the learned Judges thought proper to dissent from the view taken in this Court in *Baijnath's* case. In the partition suit, the members of the family other than the person who was responsible for the *benami* purchase, might be given property other than the property in question, and the partition could go on without any legal bar. Then it would be a matter between the auction-purchaser and the head of the family, who was responsible for the *benami* purchase, to settle between themselves who should get the property. Other cases have also been cited. The case of *Ganga Sahai* v. *Kesri* (3) is quite different. There one of the three decree-holders executed the decree for the benefit of him-

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(1) (1921) I.L.R., 42 All., 711. (2) (1922) I.L.R., 45 Mad., 856.
(3) (1915) I.L.R., 37 All., 545.

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self and other decree-holders. It was a mortgage decree. In execution of it the property was sold and was purchased by the decree-holder who was actually taking an interest in the execution of the decree. It was held that the purchase was made on behalf of all the three decree-holders. There can be no doubt, as their Lordships of the Privy Council pointed out, that there was no question of *benami* purchase. It would be difficult to see how it could be a *benami* purchase, as the name of one of the decree-holders stood in the sale certificate. Another case, and the leading case on the point, is the case of *Bodh Singh Doodhooria* v. *Gunesh Chunder Sen* (1). This was a case of the head of the family purchasing property in his own name at an auction sale. It was laid down that his purchase was for the entire family and there is again no question of *benami* purchase.

I am of opinion that, however sad may be the position of the plaintiff owing to the fact that partition has been carried out in the family, I am unable to take the case out of the provision of section 66 of the Code of Civil Procedure and must hold, and do hold, that it is barred by that provision of law.

The result is that the appeal fails and is hereby dismissed with costs.

ASHWORTH, J.—I concur.

Appeal dismissed.

(1) (1873) 12 Beng., L.R., 317.

Before Mr. Justice Lindsay and Mr. Justice Ashworth.

NANNU PRASAD (PLAINTIFF) *v.* NAZIM HUSAIN (DEFENDANT).* 1927 December 7.

Civil Procedure Code, sections 11, 96 *and* 100; *order XLI. rule* 35—Res judicata—*Cross-appeals from a decree in one suit disposed of by one judgement followed by two separate decrees—Appeal to High Court against one decree only—Act No. XVIII of* 1879 *(Legal Practitioner's Act), section* 28—*Oral agreement as to setting off fees to be earned by the debtor against amount due on a promissory note.*

Plaintiff sued to recover Rs. 3,270-15-0 as due on a promissory note executed by defendant. The defence was that owing to a certain collateral agreement nothing at all was due. The trial court found for the plaintiff to the extent of Rs. 1,721-9-2. Both sides appealed, the plaintiff claiming the full amount claimed in the plaint; and the defendant again denying his liability *in toto*. These two appeals were decided by one judgement, which reduced the amount payable to the plaintiff to Rs. 1,145, and in consequence dismissed the plaintiff's appeal. Two separate decrees were, however, prepared, and the plaintiff appealed against the decree passed in his own appeal, but not against the decree passed in the defendant's appeal. *Held*, that the appeal was not barred by the principle of *res judicata*.

The defence in the suit was that there was an oral agreement between the parties that the amount ostensibly due on the promissory note should not be paid in cash, but should be, so to speak, "worked off" by professional services to be rendered by the defendant, who was a pleader. *Held*, that in view of the distinct provisions of section 28 of the Legal Practitioners Act, 1879, this defence was not open.

Ghansham Singh v. *Bhola Singh* (1), *Damodar Das* v. *Sheoram Das* (2), *Lalla Rughoobuns Sahoy* v. *Musammat Asloo* (3), *Muhammad Sulaiman Khan* v. *Muhammad*

*Second Appeal No. 1279 of 1926, from a decree of M. F. P. Herschenroder, Additional Judge of Agra, dated the 9th of February, 1926, confirming a decree of Lakshmi Narain Tandon, Subordinate Judge of Agra, dated the 12th of September, 1925.

(1) (1923) I.L.R., 45 All., 506. (2) (1907) I.L.R., 29 All., 730.
(3) (1873) 20 W.R., 294.

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Yar Khan (1), *Mariamnissa Bibi* v. *Joynab Bibi* (2), *Panchanada Velan* v. *Vaithinatha Sastrial* (3), *Zaharia* v. *Debia* (4), and *Ram Kirpal* v. *Rup Kuari* (5), referred to.

THE facts of this case were as follows :—

The suit was brought in the court of the Subordinate Judge of Agra for the recovery of Rs. 3,270-15, alleged to be due in respect of a promissory note executed by the defendant.

The defendant, Syed Nazim Husain, who was a pleader in the Agra District Court, resisted the claim and pleaded that nothing was due from him. He admitted in his written statement that he had executed the promissory note upon which the suit was brought, but he put forward the plea that there was an agreement between himself and the plaintiff that the amount entered in the promissory note was to be liquidated by fees to be earned by him for doing professional work for the plaintiff.

The result of the suit in the court of first instance was that the plaintiff's claim was decreed to the extent of Rs. 1,721-9-2 with future interest at 6 per cent.

Both parties were dissatisfied with the decree of the court of first instance, and there were two appeals before the District Judge. The appeal of the plaintiff was numbered 456 of 1925, and that of the defendant was numbered 510 of 1925. Both these appeals were decided by one judgement, which was delivered by the Additional District Judge on the 9th of February, 1926.

The result of the trial of the two appeals in the court of the Additional District Judge was that the sum of Rs. 1,721-9-2, which the first court had awarded to the plaintiff, was reduced to Rs. 1,145. This decision

(1) (1888) I.L.R., 11 All., 267. (2) (1906) I.L.R., 33 Calc., 1101.
(3) (1905) I.L.R., 29 Mad., 333. (4) (1910) I.L.R., 33 All., 51.
(5) (1883) I.L.R., 6 All., 269.

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was come to by the learned Judge after an examination of the accounts put forward by the parties respectively.

On this finding, that the plaintiff was only owed Rs. 1,145 by the defendant, it necessarily followed that the plaintiff's appeal was dismissed, for, as already mentioned, in his appeal he was claiming the difference between Rs. 1,721-9-2 allowed him by the first court and Rs. 3,270-15, the amount of claim as stated in the plaint.

After this judgement, disposing of both appeals, was written, two decrees were prepared, one in the plaintiff's appeal No. 456 of 1925, and the other in the defendant's appeal No. 510 of 1925.

The plaintiff appealed against the appellate decree of the Additional District Judge of Agra in appeal No. 456 of 1925, that is to say, the plaintiff's own appeal, but preferred no appeal against the decree of the Additional District Judge allowing the defendant's appeal No. 510 of 1925. A preliminary objection was, therefore, raised by the defendant respondent that because the plaintiff failed to put in an appeal against the decree allowing the defendant's appeal in the lower appellate court his appeal could not be heard, on the ground of *res judicata*.

On this appeal—

Dr. *Kailas Nath Katju*, for the appellant.

Mr. *Abu Ali* (for whom Munshi *Shiva Prasad Sinha*), for the respondent.

THE judgement of LINDSAY, J., after reciting the facts as above, thus continued :—

We have heard much argument on this point and have been referred in particular to the Full Bench case of *Ghansham Singh* v. *Bhola Singh* (1) in which the

(1) (1923) I.L.R., 45 All., 506.

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previous decisions of this Court on this particular question of *res judicata* were examined and many of them overruled.

It is to be noticed, however, that one of the earlier cases on this point, *Damodar Das* v. *Sheoram Das* (1), was approved, it being held by the Full Bench that it had been correctly decided.

That was a case for an adjustment of an account between the plaintiff and the defendants. The court of first instance made a decree against which both parties appealed to the District Judge, who found in favour of the defendants. The plaintiff filed a second appeal against the decree which the District Judge had passed in the appeal brought by the defendants. He omitted to appeal against the decree which had been passed against him in his own appeal and it was argued that by failing to challenge the decree so passed against him by the District Judge he was precluded from maintaining the second appeal which, as already said, challenged the decree made in defendant's favour in the lower appellate court. Although the lower appellate court had drawn up separate decrees, one in each appeal, it was held by the Bench that "there was in fact but one decree settling the accounts between the parties". It is said in the report that the two separate decrees made by the District Judge were "duplicates". It was held that in the circumstances there was no force in the plea of *res judicata* raised in the preliminary objection.

The case now before us is similar as regards the facts. There was one suit only and, necessarily, one decree only in the trial court. Both parties were dissatisfied and the result of the trial of both the appeals was that the first court's decree was modified in favour of the defendant. There is this difference, however,

(1) (1907) I.L.R., 29 All., 730.

namely, that the two decrees in this case prepared in the District Court are not "duplicate" decrees in the sense that they are both drawn in the same language.

In my opinion this difference does not affect the principle observed in the case of *Damodar Das* v. *Sheoram Das* (1).

Lindsay, J.

There was but one suit, and on the pleadings the suit was in substance a suit for accounts and the only issue was "what sum, if any, is due to the plaintiff".

The trial court awarded the plaintiff Rs. 1,721 odd, and the lower appellate court, having heard both the appeals, came to the decision that the sum which the plaintiff was entitled to recover was Rs. 1,145 only. That is what was decided between the parties upon the only issue which had to be determined and that is the *res judicata*—the adjudication of the appellate court which, so far as that court was concerned, conclusively determined the rights of the parties in respect of the matter in controversy in the suit.

No doubt, in order to comply with the provisions of order XLI, rule 35, it was necessary for the lower appellate court to draw up separate decrees, but in such a case where there are cross-appeals from a decree in one suit there is, in fact though not in form, a single decree.

I would refer here to an old case which, to my mind, lays down the law very clearly, the case of *Lalla Rughoobuns Sahoy* v. *Mussammat Asloo* (2), and I quote the following passage from the judgement of PHEAR, J:—

"It is, however, obvious that when two parties to a suit appeal so that the one appeal is but the cross-appeal of the other, there ought to be only one final decree made between the two parties."

The law, in my opinion, contemplates that there should be only one decree in one suit, except in certain

(1) (1907) I.L.R., 29 All., 730. (2) (1873) 20 W.R., 294.

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cases in which the Code of Civil Procedure lays down that there may or must be two decrees, one preliminary and one final. A suit like the one now under consideration is not one of the exceptional cases in which two decrees are allowed or made necessary.

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In this connection I would also refer to the Full Bench ruling of this Court in *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan* (1), where it was laid down that the decree of the appellate court supersedes the decree of the first court even where the appellate decree merely affirms the original decree and does not reverse or modify it.

The function of the appellate court is to determine what decree the court below ought to have made, and it follows that where the trial court has passed only one decree, there can be substituted for that decree only one decree, should the case come up in appeal. So, while it may be that for purposes of procedure and in order to formally complete the records it may be necessary in the case of cross-appeals to draw up a separate decree in each case, there is, in fact, only one and the same decree which ought to be incorporated with each appellate record. Either decree, read, if necessary for purposes of interpretation, with the decree of the trial court ought to produce the same result, and in the present case that result which is the *res judicata* is that the plaintiff who was claiming Rs. 3,270-15-0 is entitled to Rs. 1,145 only. And this being the decision which the appellant calls in question in this second appeal, it appears to me that no question of *res judicata* arises at all. I would, therefore, overrule the preliminary objection.

(1) (1888) I.L.R., 11 All., 267.

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Coming now to the merits of the case, we have to notice in the first place the plea which is raised in the second ground of appeal. The defendant respondent is a legal practitioner, and in his written statement he put forward, by way of defence, an agreement with the plaintiff that he was to be allowed to liquidate the debt owing under this promissory note by appropriating to its extinction various sums which were to become due to him for the performance of professional services on behalf of the plaintiff. The services were to be rendered from time to time.

Dr. *Katju* has taken the plea here that under section 28 of the Legal Practitioners' Act no such agreement can be set up unless it is an agreement in writing.

Unfortunately this plea was not taken in the pleadings. It seems to have been mentioned before the Subordinate Judge, whose inclination apparently was to decide it in favour of the plaintiff, but for some reason or other he seems to have changed his opinion and to have gone on to open up the accounts between the parties, thereby giving effect to the defence plea that such an agreement for the liquidation of the debt existed.

The terms of section 28 of the Legal Practitioners' Act are very clear. No agreement such as was pleaded by the defendant in his written statement could be put forward unless it was an agreement in writing.

I have examined the record of the statement made by the defendant on oath in the trial court. He was asked expressly whether he could produce any written agreement regarding his remuneration for legal services. His answer was that the agreement between himself and the plaintiff was a verbal and not a written agreement. That admission of the defendant, therefore, concludes this part of the case. In this view I need not proceed to examine another plea which was raised by Dr. *Katju*

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on behalf of the plaintiff, namely, that the proof of such an agreement as the respondent set up was excluded under the provisions of section 92 of the Evidence Act. The result of this is that it must be taken that there was no real defence to the suit. The promissory note which was brought into suit was one of the 14th of November, 1915, on which date the account had been taken between the parties and the defendant was found owing Rs. 2,405. The defendant admits both in the written statement and in his deposition in the court that this account was taken and that he accepted the account as correct. It follows, therefore, that there should be a decree in full for the plaintiff on this promissory note. I would allow this appeal, set aside the decree of the lower court and direct that the plaintiff's claim be decreed in full with costs in all three courts.

ASHWORTH, J.—I entirely concur with the judgement of my learned brother generally and in particular with the following passage in it:—"The law, in my opinion, contemplates that there should be only one decree in one suit, except in certain cases in which the Code of Civil Procedure lays down that there may or must be two decrees, one preliminary and one final." This opinion is qualified to some extent by the following passage:—"So, while it may be that for purposes of procedure and in order to formally complete the record it may be necessary in the case of cross-appeals to draw up a separate decree in each case, there is, in fact, only one and the same decree which ought to be incorporated with each appellate record."

Now up to the present date there has never been any doubt expressed in the various decisions of this Court that where two appeals arise out of the decision in a single case it is proper for the appellate court to frame two decrees. The only question on which there has been

divergence of opinion is whether, *for the purposes of a second appeal*, these two decrees so framed may be regarded as one decree.

Up to the year 1907 it appears that the Allahabad High Court had rigorously enforced the necessity of separate appeals wherever there were two decrees, even if those decrees might be identical. Then came the case of *Damodar Das* v. *Sheoram Das* (1), wherein it was held that if the two decrees were practically identical, an appeal from one of them would operate as an appeal from both of them. Reliance was placed on a Calcutta case *Mariamnissa Bibi* v. *Joynab Bibi* (2) and a Madras case, *Panchanada Velan* v. *Vaithinatha Sastrial* (3).

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This view was dissented from by a decision of a Full Bench consisting of Sir JOHN STANLEY, Mr. Justice TUDBALL and Mr. Justice CHAMIER in *Zaharia* v. *Debia* (4). In that case it was held, relying on the Privy Council decision in the case of *Ram Kirpal* v. *Rup Kuari* (5), that although section 13 of the then Code did not apply to separate appellate decrees arising out of one suit, still section 13 of the Code was not exhaustive and the principle of *res judicata* applied. It was also held, overriding *Damodar Das* v. *Sheoram Das* (1), that it made no difference if the two appellate decrees were identical or not; there must be an appeal from each of them. The ground given was that if one of these decrees were altered in second appeal and the other decree were to stand there would be two inconsistent decrees.

Next we have the decision of *Ghansham Singh* v. *Bhola Singh* (6). There was one concurrent judgement by Sir GRIMWOOD MEARS, C. J., PIGGOTT, WALSH and RYVES, JJ. There was another judgement, agreeing as to the particular conclusion in the case but dissenting

(1) (1907) I.L.R., 29 All., 730.
(2) (1906) I.L.R., 33 Calc., 1101.
(3) (1905) I.L.R., 29 Mad., 333.
(4) (1910) I.L.R., 33 All., 51.
(5) (1883) I.L.R., 6 All., 269.
(6) (1923) I.L.R., 45 All., 506.

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as to reasons, by Sir P. C. BANERJI. The majority held, overruling *Zaharia* v. *Debia* (1), that *Damodar Das* v. *Sheoram Das* (2) had been rightly decided, and that where there were two appellate decrees, practically identical, arising out of one suit, an appeal from one would operate as an appeal from both of them. They went further and held that, even if the two appellate decrees were different to some extent, an appeal from one of them would operate as an appeal from the other *to the extent that the two decrees were identical*. It arrived at this conclusion by overruling the view of the Full Bench in *Zaharia* v. *Debia* (1) that the principle of *res judicata* applied; for it held that the decree not appealed against was not final inasmuch as "the ultimate rights of the parties must be adjusted and regulated according to the final decision of the last court of appeal" in the appeal appealed against.

I would remark that in the present case we should arrive at the same decision as we did, if we adopted the reasoning therein, but we adopt a different reason. Both these Full Bench decisions were indeed *obiter dicta*, so far as they decided anything other than that in the one case two appeals must be filed and in the other that one appeal would suffice. In the earlier case *Zaharia* v. *Debia*, there were two suits by independent plaintiffs and so the question of two decrees in one suit did not arise, although the Bench went out of its way to consider the law applicable to two decrees in one suit. In the later case, *Ghansham Singh* v. *Bhola Singh*, as BANERJI, J., pointed out, the decree not appealed against could stand without affecting the success of the other appeal, and so the question whether it operated as *res judicata* did not really arise.

It will be seen that in none of these judgements was it denied that there could be two appellate decrees aris-

(1) (1910) I.L.R., 33 All., 51. (2) (1907) I.L.R., 29 All., 730.

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ing out of one suit. The sole question considered was whether the rule of *res judicata* applied.

Now there appear to me to be two settled rules of law. One is that contained in sections 96 and 100 of the Code,—that an appeal shall lie from every decree passed whether by a first court or by an appellate court. The other rule is one not expressly declared in the Code, but one to be inferred from the rule of *res judicata* contained in section 11, and it is a rule which has been expressly affirmed by the Privy Council in *Ram Kirpal* v. *Rup Kuari* (1). It is this. A decree not appealed against is final, that is to say, the only method of getting rid of a decree is by an appeal. It appears to me that this Privy Council decision is against the view adopted in *Ghansham Singh* v. *Bhola Singh* that an appellate decree can be set aside by an appeal from a different decree even though that different decree be wholly or partly identical. No doubt there are cases in which a decision can be ignored, but that is only where a court tries a subsequent suit and has to decide a matter settled by a decree of another court, which court was not competent to hear the latter suit. *Ghansham Singh* v. *Bhola Singh*, in effect, may be said to hold that an appellate court may set aside indirectly a decree arising out of a suit, by its decision in another appeal arising out of that suit. A "decree" is "a formal expression of an adjudication". Why should an appellate court allow a formal expression of an adjudication from which it dissents to stand, while setting it aside indirectly? It would seem desirable that in a second appeal this High Court should, where the effect of appeal from one decree is to set aside in part or in whole another decree arising out of the same suit, expressly and formally set aside that other decree to the extent necessary. It appears to be thought that it cannot do so because there is no appeal from that

(1) (1883) I.L.R., 6 All., 269

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other decree, but if the existence of the decree is ignored for one purpose why hold it effectual for another purpose? I would also point out that it seems undesirable that any formal expression of an adjudication should be set aside indirectly, on the ground that the substance of a decree and not its form is to be looked at. The provision as to the drawing up of a decree is designed to leave a clear and certain record. If a decree can be set aside indirectly, this object is not attained.

That the matter is one of great difficulty would appear from the fact of the very different views, taken in two Full Bench rulings, of this case. It appears to me that the view of my learned brother that there can be only one decree in one suit cuts away the whole cause of difficulty. There can be no question of *res judicata* if there is only one decree at a time in a suit.

But there appears to be some ground for considering that the Civil Procedure Code recognizes more than one decree in a suit. Certainly practice does. The practice is, where there are two cross-appeals, to frame two separate decrees.

I will attempt to show that the Civil Procedure Code should not be construed to permit of two decrees at one time in a suit. It is true there may be a preliminary and a final decree, but as soon as the final decree is passed it swallows up and cancels the preliminary decree. The whole difficulty in construing the Code appears to me to arise from the necessity of providing for preliminary and final decrees in the same suit. Act VIII of 1859, which is the first Civil Procedure Code, only contemplated a judgement being written when there had been adjudication of "the point or points" for determination. The decree was to "bear the date on which the judgement was passed and to specify clearly the relief granted or other determination of the suit"; see sec-

tions 185 and 189. In that Act there was no definition of decree. Then we come to Act X of 1877. There a decree was defined as follows:—"Decree means the formal order of the court in which the result of the decision of the suit is embodied." In the same Code "judgement" was defined as "the statement given by the Judge as to the grounds of the decree by which a suit is determined." These definitions clearly contemplated a single judgement on the whole case. The definition of decree in Act XIV of 1882 still more definitely indicated that there should be one judgement and one decree for each suit. "Decree" was defined to mean "the formal expression of an adjudication, upon any right claimed, or defence set up, in a civil court, when such adjudication, so far as regards the court expressing it, decides the suit or appeal." And "judgement" was defined to mean "the statement given by the Judge of the grounds of a decree." We then come to the present Code of 1908. The definition of decree contained in section 2 (2) was designed, *inter alia*, to provide for a final and a preliminary decree. The definition is as follows:—

"Decree means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard *to all or any of the matters* in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 47 or 144, but shall not include:—

(*a*) any adjudication from which an appeal lies as an appeal from an order, or

(*b*) any order of dismissal for default."

Explanation.—A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."

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The definition of judgement remains as it was, namely "the statement given by the Judge of the grounds of a decree." Now it appears clear to me that there was no intention, in framing this definition of decree, to alter the rule that a whole suit should be adjudicated, so far as was possible *without further proceedings* (i.e., proceedings other than mere adjudication), by a single judgement and a single decree. Unfortunately the words in the definition, "with regard to all or any of the matters in controversy", do not make it clear that the words "or any" were merely inserted because part of the adjudication might only justify "a preliminary decree". It leaves it open to the construction that separate questions may be decided by separate judgements and a separate decree drawn up for each judgement. The proper meaning would be better expressed by substituting for the words in the definition "with regard to all or any of the matter in controversy" the words "with regard to all the matters in controversy in the suit so far as they can, for the time being, be adjudicated upon without further proceedings (other than mere adjudication)." This seems to be what is intended by the provision in the Code that the decree shall bear the date of the judgement. If there could be more than one judgement at one time, this provision would be impossible to conform with. In the same way if there are two cross-appeals against a single first court judgement, they should be settled by the appellate court by a single judgement and a single decree. If we adopt this view, the question involved in the present case, which has been settled differently by two High Courts, would cease to exist. There could be no question of *res judicata*.

My view, then, is that the Civil Procedure Code only contemplates a single decree at one time in any one

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suit. So far as any rules in the schedule provide to the contrary, they should be amended. So far, again, as any practice of the court recognizes more than one decree in one suit, that practice should be discontinued, whether the practice is carried out in the filing of records or otherwise. Whenever an appellate court decides an appeal against a decree of a lower court, the appellate court should frame as its decree a comprehensive document, which would remove all need or reference to any other document for the purpose of knowing what must be held to be the adjudication in the whole suit. It appears to me to be more desirable for the appellate court to frame a document settling the actual final adjudication than to leave it for a lower court to do so, in execution or otherwise, by harmonizing the various documents on the file miscalled "decrees." A decree set aside by an appellate order or swallowed up by a final decree should have endorsed thereon this fact.

BY THE COURT.—The order of the court is that the appeal is allowed, the decree of the lower court is set aside and a decree will be drawn up decreeing the plaintiff's claim in full with costs in all three courts.

Appeal allowed.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Mukerji.

1927 December, 8.

BABUNA KUNWAR (PLAINTIFF) *v.* JAGAT NARAIN SINGH AND ANOTHER (DEFENDANTS).*

Hindu law—Mitakshara—*Joint family property—Partition between uncle and nephew on death of grandfather—Grandmother entitled to a share.*

In the case of a partition between a son and a grandson (being the son of a deceased son) of a Hindu female, she is entitled to a share. *Sheo Narain* v. *Janki Prasad* (1) and *Kanhaiya Lal* v. *Gaura* (2), referred to.

THE facts of this case were as follows:—

One Bhagirathi Singh, a Hindu governed by the *Mitakshara* law, died, leaving him surviving a widow, Musammat Babuna Kunwar, a son Jagat Narain and another son, since deceased, Jai Gobind, the father of Sham Narain. The family possessed joint property. By an award, obtained at the instance of Jagat Narain and Sham Narain, the family property was divided equally between the uncle and nephew. Babuna Kunwar, thereupon, asked for a share, but was refused. She then instituted the suit, out of which this appeal arose, for the separation of a third share for her. Sham Narain alone defended the suit. His case was that the plaintiff was not entitled to any share under the *shastras* and that she was possessed of considerable property, being her *stridhan*, and, therefore, she did not require any other property for her maintenance. The trial court held that the plaintiff had no property which could support her and that, in the circumstances of the case, the plaintiff could not get a share and that she must look to her son, Jagat Narain, for her support. The plaintiff appealed.

*First Appeal No. 328 of 1924, from a decree of Raj Behari Lal, Subordinate Judge of Ghazipur, dated the 29th of May, 1924.

(1) (1912) I.L.R., 34 All., 505. (2) (1924) I.L.R., 47 All., 127.

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On this appeal—

Dr. *M. L. Agarwala* and Munshi *Kamla Kant Varma*, for the appellant.

Dr. *Surendra Nath Sen* and Mr. *B. Malik*, for the respondents.

THE judgement of the Court (MEARS, C.J., and MUKERJI, J.), after stating the facts as above, thus continued :—

No attempt has been made, on behalf of Sham Narain, to support the decree of the court below on the ground that the plaintiff possessed property sufficient for her maintenance. The only question which we have to decide in this appeal is whether in the case of a partition between a son and a grandson of a female, the latter is entitled to a share, the grandson being the son of a son who is other than the surviving one.

The learned Subordinate Judge was of opinion that the present case was governed by the Full Bench case of *Sheo Narain* v. *Janki Prasad* (1). In that case the facts were materially different, inasmuch as the partition was between the female claimant's son and his own sons. The learned Judges pointed out that there were two texts of the sage *Yajnavalkya* relied upon by the author of *Mitakshara* and these considered only two cases of partition. One case was when the father was alive and the partition proceeded in his lifetime and the other case was when he was dead and the descendants proceeded to divide the property among themselves. In the former case, they pointed out, the "father's wife" took, as such, a share. In the latter case, the "mother" took as such a share. It was further stated that *Vijnaneswara* did not contemplate the case of a partition between a father and his own sons, and did not provide for a share for the father's mother in such a case. The case before us

(1) (1912) I.L.R., 34 All., 505.

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is, clearly, not the same as was submitted for the consideration of the Full Bench. Here, as already stated, the partition is between a grandson and paternal uncle of the grandson. The case falls within the four corners of the text which contemplates a partition "on the death of the father". Colebrooke in his translation of the *Mitakshara* translates the text of *Yajnavalkya* bearing on the point in the following language: "Of heirs dividing after the death of the father let the mother also take an equal share". Probably a better translation would be as follows: "When there is a partition on the death of the father let the mother take an equal share". It is agreed on all hands that if this text applies, the plaintiff would be entitled to a third share. In our opinion there can be no doubt that this text is directly applicable. Although, strictly speaking, in a joint Hindu family governed by the *Mitakshara* law, every male member in the family is the owner of every portion of the joint family property, still it is the head of the family who is supposed to "own" the entire property. The passage quoted above occurs after *Vijnaneswara* has discussed the separate and joint family properties. It seems to us to be clear that when he was speaking of the division of father's property, he was speaking both as regards the separate and the joint family property. The only question material, therefore, is who is the person that should be called the father in the present case. The point seems to us to be so clear as not to admit of any two opinions. Sham Narain and Jagat Narain, when they divided the family property, did not seek the division of Jai Gobind's property. Sham Narain, stepping into the shoes of Jai Gobind, claimed an equal share with Jagat Narain. Jagat Narain's father Bhagirathi was therefore *the father* on whose death the partition has taken place. In this view the plaintiff, as the mother of Jai Gobind and Jagat Narain, would be

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entitled to a share equal to that of her sons. Thus she would be entitled to a third share in the property.

The case of *Kanhaiya Lal* v. *Gaura* (1) has been brought to our notice. In this case the grandsons of one Nain Sukh, by his only son Chhunni, claimed a partition between themselves. The question was whether Nain Sukh's widow (the grandmother of the claimants for partition) was entitled to a share. It was held that she was. The case of *Sheo Narain* v. *Janki Prasad* (2) was distinguished. But we need not consider that case. It may or may not support the case of the plaintiff before us. We are of opinion that on the text quoted in the Full Bench case aforesaid, the plaintiff is entitled to the share claimed.

We allow the appeal, set aside the decree of the court below and decree the plaintiff's claim for a third share. The contesting defendant will pay the appellant's costs in both the courts.

Appeal allowed.

Before Mr. Justice Lindsay and Mr. Justice Ashworth.

TASKIN FATMA (APPLICANT) *v.* MUHAMMAD MUNIM BAKHSH (OPPOSITE PARTY).*

1927 *December*, 8.

Act No. VIII of 1890 (*Guardians and Wards Act*), *sections* 33 *and* 43—*Distinction between provisions of the two sections—Effect of guardian filing a suit on behalf of his ward without obtaining consent of court.*

The guardian of a minor Muhammadan girl, with the consent of the District Judge, entered into certain arbitration proceedings with the object of settling disputes between his ward and her brothers. An award was made and a decree in accordance therewith followed. Subsequently the girl married, being still a minor, and her husband was appointed her

*First Appeal No. 107 of 1927, from an order of E. T. Thurston, District Judge of Budaun, dated the 4th of March, 1927.

(1) (1924) I.L.R., 47 All., 127. (2) (1912) I.L.R., 34 All., 505.

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certified guardian. The husband then applied to the District Judge for permission to institute a suit on behalf of his wife to get the arbitration proceedings and the decree based thereon set aside. The Judge refused permission.

Held that no appeal lay from such order. But there was nothing in the Guardians and Wards Act to prevent a guardian from filing a suit on behalf of his ward without the consent of the Judge; only, in such a case the guardian would not have the protection afforded by sub-clause (3) of section 33 of the Act.

THIS was an appeal against an order made by the District Judge of Budaun on the 4th of March, 1927.

The facts of the case were briefly as follows:—Musammat Taskin Fatma was a minor, the daughter of one Ghafur Bakhsh, deceased. At the date of these proceedings, she was married to Qayum Bakhsh, who, after becoming her husband, was appointed by the District Judge of Budaun as the guardian of her person and property.

Before Qayum Bakhsh married this minor girl her guardian in the court of the District Judge was her uncle Sattar Bakhsh, and while Sattar Bakhsh was acting as guardian under the court, he, with the consent of the District Judge, entered into certain arbitration proceedings in order to settle disputes between the sons of the deceased Ghafur Bakhsh and this girl Musammat Taskin Fatma, regarding the division of the property. Admittedly an award was passed, and that award was subsequently made a rule of the court.

In the month of August, 1926, after Qayum Bakhsh had been appointed guardian of his wife, he presented a petition to the District Judge, asking for the court's permission to institute a suit on behalf of his wife for the purpose of having the award and the decree which had been passed, set aside on the ground of fraud and collusion. The District Judge refused the permission asked for, hence this appeal.

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Dr. *Kailas Nath Katju*, Munshi *Shiva Prasad Sinha* and Maulvi *Shah Zamir Alam*, for the appellant.

Mr. *A. M. Khwaja*, Babu *Peary Lal Banerji* and Maulvi *Mushtaq Ahmad*, for the respondents.

THE judgement of the Court (LINDSAY and ASHWORTH, JJ.), after reciting the facts as above, thus continued :—

It is apparent from the record, which is before us, that Qayum Bakhsh behaved in the most indiscreet manner and incurred the displeasure of the District Judge for what we must admit to be very good reason. When the application was put before the learned Judge he directed its consideration to be postponed, because at the time he thought that the husband of the girl and the other members of the family were angry with each other, and that if their anger were allowed to cool, matters might be amicably arranged. He passed an order on the 10th of September, 1926, postponing consideration of the application. Then on the 4th of March, 1927, he passed the order which is now under appeal. All that the order says is as follows :—

"It is sufficiently clear from the events subsequent to my order of the 10th of September, 1926, and from the conduct of the applicant that the application was made *malâ fide*. I dismiss it."

We understand the applicant mentioned in this order to be not the minor herself but her guardian Qayum Bakhsh.

This order is attacked here on various grounds, and it is said that the application for leave to file a suit on behalf of his minor wife ought to have been allowed by the court on the ground that it was for the interest of the lady that such a suit should be brought.

It appears to us that there is a misunderstanding about the nature of the proceedings in the court below and

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of the effect of the order which was passed by the Judge on the 4th of March, 1927, and which is sought to be set aside by this appeal.

There are certain provisions of the Guardians and Wards Act, which lay down that a guardian is not allowed to do certain acts on behalf of his ward without the leave of the court first obtained. But we are not aware of any provision of the Act which makes it necessary for a guardian appointed under the Act to ask for the court's permission before he files a suit on behalf of his ward.

There is of course section 33, which gives a guardian appointed by the court the right to approach the court and ask for its opinion, advice or direction on any present question respecting the management or administration of the property of his ward. Then the section goes on to say that the court, if it thinks necessary, may cause notice of such an application to be served on all persons interested. Sub-section (3) declares that if a guardian states in good faith the facts in his petition to the court, and if he acts upon the opinion, advice or direction given by the court, he shall be deemed, so far as regards his own responsibility, to have performed his duty as guardian in the subject-matter of the application. So far as the matter covered by section 33 is concerned, if he has stated the facts to the court in good faith, and if he acts upon the opinion, advice or direction given by the court, he will not be held responsible thereafter on any claim to be made against him by his ward.

When this application was presented by the minor's guardian to the District Judge, no section was quoted under which the application purported to be made, but we have come to the conclusion that there could have been no other section except section 33 under which such an application was entertainable. Section 43 of the Act has been mentioned, with the suggestion that it may be

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supposed that the order made by Mr. Thurston on the 4th of March, 1927, was an order under section 43. If it was an order under section 43, it would be appealable under section 47. But we do not think that the order is one under section 43. The application does not at all appear to have been under that section, nor can we treat the order of Mr. Thurston as one regulating the conduct or proceedings of the guardian appointed or declared by the court. The order, therefore, is not one under section 43 and is not appealable. All that can be said is that it was passed apparently in a proceeding taken under section 33, and that it must be taken that the court was of opinion that the suit which the guardian proposed to file was a suit which should not be brought. That order will not prevent the guardian from bringing the suit, if he is so advised, but in bringing the suit he acts at his own risk and will not be entitled to the indemnity which is conferred upon guardians acting with the advice of the court under sub-section (3) of section 33. Dr. *Katju* has undertaken on behalf of the guardian that any suit which he proposes to file is to be conducted at the expense of the guardian himself. We make a note of this undertaking, and place it on record in order that it may bind the guardian in any future proceedings in which the question of indemnity for costs may arise. We must hold, therefore, that no appealable order was passed by the court below. We, therefore, dismiss the appeal. We leave the parties to pay their own costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Boys and Mr. Justice Ashworth.

1927 December, 12.

EMPEROR *v.* SHEO DIN AND OTHERS.*

Criminal Procedure Code, section 307—Acquittal by a jury—Reference to the High Court—What the order of reference should contain.

In making a reference under section 307 of the Code of Criminal Procedure, the Judge should, in effect, show the reasons for convicting the accused in as clear a manner as he would have done if the case had not been a jury case and he had had to write a convicting judgement.

THIS was a reference under section 307 of the Code of Criminal Procedure made by the Sessions Judge of Cawnpore. The circumstances under which the reference was made and the reasons which led the Court to reject it are sufficiently stated in the judgement of BOYS, J.

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

Pandit *Brijmohan Lal Dave* and Babu *Hem Chandra Mukerji*, for the opposite parties.

BOYS, J.—This is a reference by Mr. Raja Ram, Sessions Judge of Cawnpore, of a case in which a jury have found nine men not guilty of the dacoity which they were alleged by the prosecution to have committed. Section 307 of the Code of Criminal Procedure gives the learned Judge power to refer a case like this, but directs him, when referring it, to record the grounds of his opinion that it is necessary for the ends of justice to submit the case. We have read the referring order, and it gives us no information at all beyond that there are two witnesses, Banjari and Tulsi, for the prosecution, who state something unspecified, and the evidence of a Sub-Inspector, Amanul Haq, who speaks to the absconding

*Criminal Reference No. 444 of 1927.

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of one of the accused. The rest of the referring order is confined to brief statements that there is no evidence to support this or the other allegation made by the accused. The learned Judge's referring order should certainly have been in the nature of a judgement which would give this Court a proper summary of the evidence for the prosecution and the reasons of the learned Judge for holding it to be credible. The charge to the jury obviously cannot supply this Court with the necessary information as to the evidence and as to the opinion of the Judge in regard thereto. In directing the jury it is, of course, open to the Judge to state his opinion of the value of that evidence; but when he disagrees with the verdict of the jury, it is obviously desirable that he should state his reasons much more fully. Against eight out of nine of the present accused persons we have the evidence of Banjari and Tulsi, and against the ninth Tulsi gives no evidence. Banjari is an approver, and we do not find that there is any suggestion at all that his evidence was corroborated except by the evidence of Tulsi, and in the case of some of the accused, identification of them in jail by some witnesses. It is manifest that Tulsi is in the position of an accomplice himself. He declares that he was present in the gang that was going to commit this dacoity, and that he only left it because it was postponed on the night on which it was originally intended to commit it. He also says that he had agreed to commit a dacoity in another place with the same gang two or three nights later, but some members of the gang failed to turn up. If the learned Judge had endeavoured to examine, for the purpose of informing this Court, the evidence for the prosecution, he would have seen that the evidence of identification in jail was utterly worthless. One or other of the accused, and sometimes batches of them, were put up on several occasions for identification by one or other of the prosecution witnesses. A

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sample of the worthlessness of the identification is to be found in the record of the identification proceedings of the 7th of April when Musammat Rampiari, Kajaram and Kasim were invited to identify Sheodin, Sheoram, Mania Singh, one Ramlal and Bala. Musammat Rampiari identified only Mania Singh, i.e., one person alleged to be one of the dacoits, and another person wrongly. Rajaram is said to have identified three rightly, but also identified two wrong persons. Kasim failed to identify a single right person and identified four wrong persons. Yet the evidence of this latter witness, Kasim, was put to the jury as being of some weight against Subhani. It is manifest that an examination of these identification proceedings would have given the Judge reason to pause before he referred this case. It is quite superfluous to examine it in greater detail. It would be most unjust to the jury who heard this evidence to say that their verdict was in any way perverse, and it even appears to us the only possible verdict at which they could arrive.

ASHWORTH, J.—I fully concur. The words in section 307 of the Code of Criminal Procedure "recording the grounds of his opinion" mean, in my view, that the Judge making a reference should, in effect, show the reasons for convicting the accused in as clear a manner as he would have done if the case had not been a jury case and he had had to write a convicting judgement. The High Court has not got the witnesses before it, and it appears to me impossible in many cases for it to convict on evidence that it has not heard, unless it is assisted in examining that evidence by a judgement written by the Judge who heard that evidence. In referring a case under section 307, the Sessions Judge takes on himself the responsibility of requiring this Court to "consider the entire evidence" [as stated in section 307(3) of the Code of Criminal Procedure]; and if the Sessions

Judge fails to write what is in effect a judgement, as stated above, there is a risk that he may too lightly put this Court to the trouble of considering the entire evidence.

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BY THE COURT :—The reference is rejected.

Reference rejected.

FULL BENCH.

Before Mr. Justice Lindsay, Mr. Justice Boys and Mr. Justice Iqbal Ahmad.

EMPEROR *v.* LAL BAHADUR.*

1927 *December*, 15.

Criminal Procedure Code, section 422—Jail appeal—Right of accused, where notice has been given, to appear in person at the hearing of his appeal.

Where a convict has appealed from jail, and notice of the hearing of the appeal has been sent in the terms of section 422 of the Code of Criminal Procedure, the appellant has a right, if he so desires, and if he is not represented by any legal practitioner, to appear in person at the hearing of his appeal. *Queen-Empress* v. *Pohpi* (1) and *Ram Prasad* v. *Emperor* (2), dissented from.

This was an application in revision against an order of the Sessions Judge of Cawnpore refusing to procure the attendance, for the purpose of arguing his appeal in person, of an accused person who had appealed from jail and to whom notice of the hearing of the appeal had been given under the terms of section 422 of the Code of Criminal Procedure. The case came before BOYS, J., who, being of opinion that the appellant had a right, if he so desired, to be present in person at the hearing, asked for a reference to a Full Bench, in view of the decision of the Court in *Queen-Empress* v. *Pohpi* (1).

*Criminal Revision No. 828 of 1927, from an order of Abdul Halim, Sessions Judge of Budaun, dated the 21st of November, 1927.

(1) (1891) I.L.R., 13 All., 171. (2) (1927) 103 Indian Cases, 407.

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The parties were not represented.

LINDSAY, BOYS and IQBAL AHMAD, JJ. :—The question referred to the Full Bench concerns the right of a convict in jail, whose appeal is pending, to appear in court in person, if he so desires, on the date fixed for the hearing of his appeal, and to argue his case in person.

A learned Sessions Judge had refused such a convict the right to appear, basing his decision on the case of *Queen-Empress* v. *Pohpi* (1) and *Ram Prasad* v. *Emperor* (2). The convict appellant applied to this Court, and his application came before Mr. Justice BOYS. Mr. Justice BOYS feeling himself unable to accept without qualification the decision of the Full Bench in *Queen-Empress* v. *Pohpi* (1), referred the matter to the Hon'ble the CHIEF JUSTICE with a view to re-consideration of that ruling. As the matter was very urgent, Mr. Justice BOYS further directed the learned Sessions Judge to make arrangements, with the assistance of the District Magistrate, for the appellant to be produced in his court on the date fixed for the hearing of the appeal. The matter has now come up before us for disposal.

In the referring order the learned Judge said :—

"By section 422 of the Code of Criminal Procedure this Court is ordered to give notice to the appellant or his pleader, and it is clear that if there is no pleader the court must give notice to the appellant. If the appellant does not express a desire to appear in court in person, there is, of course, an end of the matter, but if he expresses a desire to appear, it seems to me an unsustainable attitude to hold that though he must be given notice he may be physically restrained from taking advantage of that notice, even though he may have expressed a wish to do so. If on receipt of the notice the appellant desires to be heard in person, I think to refuse to make arrangements for his appearance is to deny him the right which is a logical consequence of his right to have

(1) (1891) I.L.R., 13 All., 171. (2) (1927) 103 Indian Cases, 407.

notice. If he does not ask to be allowed to appear, it is not necessary that he should be produced."

We have considered the decision of the Full Bench of this Court in *Queen-Empress* v. *Pohpi* (1) and we are unable to agree with the reasoning in that case, and are of opinion that the decision went too far when it held that an appellant from jail has no right to appear at the hearing of his appeal, if he desires to do so and has no pleader to represent him. Similarly, we find ourselves unable to agree with the learned Judges in the case of *Ram Prasad* v. *Emperor* (2), where they say: "As he appealed from jail he was not entitled to appear in person to argue his appeal". We hold that where the stage has been reached of an appellant being given notice under section 422 of the Code of Criminal Procedure, he is entitled, if he so desires, to appear in person, if he is not represented by a pleader. As in the particular case Mr. Justice BOYS has already given directions for the appellant to be produced in court, no further order is required.

Reference answered.

(1) (1891) I.L.R., 13 All., 171. (2) (1927) 103 Indian Cases, 407.

APPELLATE CIVIL.

Before Justice Sir Cecil Walsh and Mr. Justice Iqbal Ahmad.

1927 *December*, 19.

LAL SINGH (DEFENDANT) *v.* JAGRAJ SINGH (PLAINTIFF) AND SUJAN SINGH AND ANOTHER (DEFENDANTS).*

Hindu law—Joint family property—Mortgage—Mortgage executed by two brothers, one being the karta *of the family—Suit on mortgage followed by decree—Right of member of the family not made a party to the suit to challenge the decree before execution without alleging that the original debt was tainted with immorality.*

Two brothers, one of whom was the managing member in a joint Hindu family consisting of themselves and their children, executed a mortgage of some of the family property. The mortgagee sued on his mortgage. One of the brothers having died before decree, his two sons were brought upon the record in his place; but the minor son of the other brother was not made a party to the suit at all. This son, after the mortgagee had obtained a decree, but before it had been executed, sued to have the decree set aside upon the ground that the property concerned was ancestral and that there was no legal necessity for incurring the debt to secure which the mortgage had been executed. He did not allege that the debt was tainted with immorality.

Held, that the suit must fail. *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1), *Armugham Chetty* v. *Muthu Koundan* (2), *Chandradeo Singh* v. *Mata Prasad* (3), *Brij Narain* v. *Mangal Prasad* (4), *Sahu Ram Chandra* v. *Bhup Singh* (5), *Ali Ahmad* v. *Sohan Lal* (6) and *Gauri Shankar* v. *Jang Bahadur Singh* (7), referred to.

The facts to the case were as follows :—

The suit was brought by a minor to set aside a mortgage decree. Defendant No. 1 obtained a decree for sale on a mortgage executed by Bhagwant Singh and Imrat Singh, who were presumed for the purpose of

*First Appeal No. 67 of 1927, from an order of J. Allsop, District Judge of Aligarh, dated the 25th of February, 1927.

(1) (1879) I.L.R., 5 Calc., 148.
(2) (1919) I.L.R., 42 Mad., 711.
(3) (1909) I.L.R., 31 All., 176.
(4) (1923) I.L.R., 46 All., 95.
(5) (1917) I.L.R., 39 All., 437.
(6) (1914) 12 A.L.J., 613.
(7) (1924) 79 Indian Cases, 1008.

this decision to have been, or to have represented, the two branches of a joint Hindu family. It was presumed that they were brothers, and that one of them was the *karta*. Imrat Singh died before the decree, and his two sons became parties as his sons. Bhagwant Singh, being still alive, was also a party, but the minor son of Bhagwant Singh, namely, Jagraj Singh, the present plaintiff, was not a party. There was no evidence that the mortgagee even knew of his existence.

The present plaintiff sued for a declaration that the mortgaged property was not liable to be sold in execution of the decree, on the ground that it was ancestral property of the family to which he belonged and that there was no legal necessity for the loan for which the mortgage was given. The Subordinate Judge dismissed the suit on the ground that it did not lie in the absence of an allegation that the mortgage was made for a debt tainted with immorality. The District Judge overruled this decision and remanded the case as having been wrongly disposed of upon a preliminary point. The defendant mortgagee appealed.

On this appeal—

Munshi *Narain Prasad Ashthana*, for the appellant.

Mr. *T. A. K. Sherwani*, Mr. *A. M. Khwaja* and Munshi *Panna Lal*, for the respondents.

THE judgement of WALSH, J., after reciting the facts as above, thus continued :—

The difference between the two learned Judges, which has been argued before us, centres round the following controversy. It is admitted that a mortgagee, in order to substantiate a suit upon his mortgage, has to prove that the debt was incurred for legal necessity. It is admitted on the other hand that if a decree has been obtained upon a mortgage by the mortgagee, or upon a simple money debt by a creditor, and as the result of

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either of these decrees the ancestral property has by sale passed into the hands of a third party, the absent son, or a minor son, who was not represented, cannot recover the property in the hands of a third person without alleging that the debt for which it was incurred was tainted with immorality, or, in other words, without showing that the pious obligation of a Hindu son to discharge his father's debts does not apply to this transaction, because there is no pious obligation to pay debts tainted with immorality. But there is a stage midway between these two contingencies, what may be described as a *tertium quid*: what is the legal position of a son who was no party to the suit, where the debt or legal obligation has passed into a decree but no execution proceedings have taken place upon the decree, and no part of the ancestral property has passed into the hands of a third person? A subsidiary branch of the same question arises very frequently in these Provinces where the mortgagee himself purchases at the sale, because in one sense the mortgagee adds the capacity of purchaser to that of decree-holder, although he is in fact the same individual.

The view of the Subordinate Judge is based upon two *dicta* of the Privy Council. It must be said, by the way, that these *dicta* are, if the expression may be used, not precisely on the level of what is ordinarily intended to be understood by the expression *obiter dicta*, but are expressions of opinion by the highest tribunal made with the intention and desire of providing guidance to the courts in India. They must, therefore, be accepted as authorities binding upon the courts in India for all practical purposes with the same force as a statute. The only question is whether they are properly understood, and to what circumstances they are intended to be applied. In the case of *Sahu Ram Chandra* v. *Bhup Singh* (1),

(1) (1917) I.L.R., 39 All., 437.

Lord SHAW, who delivered the judgement of their Lordships, said as follows :—.

"A perusal of the numerous authorities will show that where a joint family property has been sold out and out, or where a decree in execution of the mortgage has been obtained against the property, and rights have thus sprung up with regard to the joint family estate, these rights are not to be defeated by the members of the joint family simply questioning the transaction entered into by its head."

The argument, which we are asked to accept on behalf of the respondent in support of the District Judge's decision which is under appeal, is that there is a slight verbal variation from what their Lordships intended to convey, and that the expression "a decree in execution of the mortgage has been obtained" should be read as though the words were "a decree enforcing the mortgage has been executed by sale". It is true to say that the illustration immediately following the passage just quoted certainly deals with the more limited meaning of the passage suggested to us in argument as the right interpretation. It is equally true to say that, where a decree remains unexecuted and merely places in the hands of the creditor a higher right in which his original right has been merged, with an immediate possibility of obtaining execution, certainly no right of any third person has sprung up against the estate.

The next pronouncement of the Privy Council, which arises for interpretation in its bearing upon this controversy, is the opinion of their Lordships delivered by Lord DUNEDIN in the more recent case of *Brij Narain* v. *Mangal Prasad* (1) and particularly the five propositions laid down expressly by their Lordships for the guidance of the courts in India, in the closing passages of Lord

(1) (1923) I.L.R., 46 All., 95.

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DUNEDIN'S opinion. The second proposition is the relevant one. It runs as follows:—

"If the managing co-parcener is the father and the reversioners are the sons, he may, by incurring debts, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt."

The first observation upon that passage is that precisely the same criticism may be made upon it as upon the passage cited from Lord SHAW'S opinion, namely, that it does not contemplate a right of a third party which has sprung into existence. In that respect it is consistent .The creditor's claim rests still "upon the hypothesis stated" in a mere decree. There is no third person. None the less a son absent from the suit cannot challenge the decree without alleging, as the Subordinate Judge held in this case that he ought to allege, the existence of some immorality tainting the debt. It is further to be observed, and this certainly strikes me as an important observation, that whereas their Lordships, in the opinion delivered by Lord DUNEDIN in *Brij Narain's* case, were careful to review and to correct a solemn and important dictum contained in Lord SHAW'S judgement in the case of *Sahu Ram Chandra*, with which they did not agree, they neither referred to and, therefore, did not attempt to review or correct, the important passage also contained in the opinion which I cited above. It may certainly be said that under the circumstances it would not be a violent presumption to suppose that, having studied it and reconsidered it, they saw no reason to dissent from it. The real objection made in argument by the experienced advocate who has argued this case on behalf of the respondent, to our applying the second proposition from Lord DUNEDIN'S opinion to this case, is that the second proposition in terms deals only with a simple money debt and a simple money decree, and in

this relation above all there is a fundamental difference between the considerations applicable to a simple money decree and to a mortgage decree, because a mortgage decree being no more than the enforcement of the original contract, and being necessarily and fundamentally concerned with the original alienation of the joint estate, it is therefore that one ought to guard oneself with particular care against extending the second proposition to a wider area than that to which it was applied. I recognize the difficulty. Unaided, I recognize that I might experience considerable difficulty in making up my mind on which side of this dividing line the true intention and interpretation intended to be conveyed by the Privy Council really lies, but I am not altogether unaided. It happens that there are two cases by single Judges cited in argument before us, both by learned and experienced Judges, on this point. Mr. Justice PIGGOTT, for whose judgement I have the most profound respect, in the case of *Ali Ahmad* v. *Sohan Lal* (1), gave elaborate reasons for holding the view which I think is consistent with the view of the District Judge in this case. But that was in 1914, before the more recent pronouncements of the Privy Council had been made. Since then Mr. Justice DANIELS, in the case of *Gauri Shankar* v. *Jang Bahadur Singh* (2), sitting in Oudh and, it is true, following previous decisions in Oudh, but obviously basing himself more upon the recent decision of the Privy Council in *Brij Narain's* case, came to a conclusion in accordance with that of the Subordinate Judge in this case. If he had not touched the difficulty raised by Mr. *Panna Lal*, on behalf of the respondent, that the second proposition in the case of *Brij Narain* is in express terms confined to a simple money debt, I think I might have yielded to the doubt which that argument raised in my mind. But the final passage of Mr. Justice DANIEL'S judgement gives

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(1) (1914) 12 A.L.J., 613. (2) (1924) 79 Indian Cases, 1008.

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reasons, based upon a Madras High Court decision, which has been impliedly approved by the Privy Council, for holding that there is no real distinction between the two cases of a simple money decree and a decree for a debt secured by a mortgage, in relation to this troublesome controversy. I, therefore, prefer the view of the Subordinate Judge. I think the weight of authority is in favour of it. I agree with his view with some hesitation. The question must often arise in the near future, and I can quite understand that if another two-Judge Bench, in a case of higher pecuniary value than this case, has reason to think that this decision requires further consideration, it may well be thought a topic worth the decision by a fuller Bench than two Judges, but for the purpose of today I am satisfied that we ought to allow this appeal and restore the decree of the first court.

IQBAL AHMAD, J.—I agree in the order proposed, but I prefer to base my decision on grounds other than those assigned by my learned brother.

In my judgement the answer to the question whether a Hindu son is entitled to challenge a decree obtained against his father for sale of the joint family property, without asserting and proving that the debt secured by the mortgage was incurred for illegal or immoral purposes, must depend upon the question whether or not the father was sued as *karta* and manager of the joint family. If he was, the answer must be in the negative. If he was not, the answer must be in the affirmative.

It is well settled that a Hindu son is under a pious obligation to discharge his father's debts that are not tainted with immorality, and it is equally well settled that once the joint ancestral property has passed out of the joint family in execution of a decree for the father's debt, his sons, by reason of their obligation to pay their father's debts, cannot recover that property unless they show

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that the debt, in respect of which the decree was obtained, was a debt incurred for illegal or immoral purposes; *vide Suraj Bunsi Koer* v. *Sheo Persad Singh* (1). But it appears to me that these propositions of law have reference only to simple money debts which the father is under a personal obligation to pay and to simple money decrees obtained against the father for recovery of such debts, and that a distinction must be drawn between a simple money debt and a decree for such debt on the one hand and a debt secured by a mortgage of the family property and a decree for sale of such property on the other. So far as a simple money debt or a decree for such debt against the father is concerned, the father is under a personal obligation to discharge that debt or that decree, and the sons labour under a pious obligation to discharge the liability of their father. But in the case of a debt incurred on the security of a family property by the father, when the mortgagee has not sued for recovery of the debt within six years of the date of accrual of the cause of action and has thus allowed his right to a simple money decree against the father to become time-barred, the personal obligation of the father disappears, and the mortgagee is then only entitled to recover the debt by sale of the mortgaged property and in such case the sons labour under no pious obligation to discharge that debt for the simple reason that the debt is not due from their father.

If I am right in the distinction that I have drawn between a simple money debt and a decree for such debt, and a mortgage debt and a decree for sale, then, in my judgement, the principle underlying the decision in *Suraj Bansi's* case cannot be applied to the case of a decree for sale on the basis of a mortgage of the family property. In the case of a suit brought by a creditor against the father for recovery of a simple money debt, all that he has

(1) (1879) I.L.R., 5 Calc., 148.

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to prove, in order to entitle him to a decree, is that he advanced the debt, and it is not necessary for him to prove the purpose for which the debt was incurred. On the other hand, in a suit for sale of the family property, the mere fact that the mortgagee advanced the debt does not entitle him to a decree, unless and until he succeeds in further proving that the debt was advanced for family necessity. Because of their pious obligation to discharge their father's debts the sons cannot impugn the validity of a simple money decree to which they were no party, on the ground of the absence of legal necessity for incurring the debt. But in the case of a decree for sale, when the personal remedy against the father has become time-barred, the sons are under no such obligation and, therefore, if the mortgagee has obtained a decree for sale of the joint family property without impleading the sons or without suing the father in his representative capacity, the sons are entitled to challenge the validity of that decree on the ground that they being no parties to that decree are not bound by the same, and in such a suit, unless the mortgagee succeeds in proving that the debt secured by the mortgage was for legal necessity, the sons will be entitled to avoid the decree. If the father in a suit for sale is sued as manager of the family, i.e., in his representative capacity, then, no doubt, the decree will bind all the members of the family, and the omission of the father to put the mortgagee to proof of legal necessity will disentitle the other members of the family from challenging the validity of the decree on any ground whatsoever, for the simple reason that in the eves of law all the members will be deemed to have been represented by the father in the suit. But if the father has not been sued in his representative capacity, I see no ground for holding why the sons, who were not impleaded as parties to the suit, should not have the right to call upon the mortgagee decree-holder to prove the existence of legal necessity for

incurring the debt secured by the mortgage before he can enforce that decree by sale of the family property. To hold that the decree obtained by a mortgagee for sale of the family property against the father alone, when the father was not sued as manager of the family, is binding on the sons and the sons can only avoid that decree by proving that the mortgage debt was contracted for immoral purposes would be in effect to hold that the mortgagee, simply by his omission to implead the sons and to sue the father in his representative capacity, can absolve himself of the burden of proving legal necessity as a condition precedent to a decree for sale of the family property, and can shift the burden of proof from his shoulders on to those of the sons, and I can discover no justification for such a proposition of law. The view that I take is the view that was taken in the case reported as *Ali Ahmad* v. *Sohan Lal* (1) and if the view taken by Mr. Justice DANIELS in the case of *Gauri Shankar* v. *Jang Bahadur Singh* (2) is at variance with the view that I have taken, I respectfully dissent from that decision. In the last mentioned case the learned Judge supported the conclusion arrived at by him by reference, amongst others, to the case of *Armugham Chetty* v. *Muthu Koundan* (3) and to a passage to be found in the judgement of their Lordships of the Judicial Committee in the case of *Sahu Ram Chandra* v. *Bhup Singh* (4). I am unable to discover anything in the Madras case that lends countenance to the view that a Hindu son is debarred from calling into question the validity of a decree for sale of the joint ancestral property to which he was not a party, and which was not obtained against the father as manager of the family, on the ground that the debt secured was not incurred for legal necessity. The passage quoted from the judgement in *Sahu Ram Chandra's* case at first sight

(1) (1914) 12 A.L.J., 613. (2) (1924) 79 Indian Cases, 1008.
(3) (1919) I.L.R., 42 Mad., 711. (4) (1917) I.L.R., 39 All., 437 (446).

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appears to support the conclusion arrived at by the learned Judge, but in view of the decision of their Lordships in the case of *Brij Narain* v. *Mangal Prasad* (1) I am unable to hold that their Lordships ever intended to lay down the proposition of law enunciated in *Gauri Shankar's* case.

The passage referred to by the learned Judge is as follows :—

"A perusal of the numerous authorities will show that where a joint family property has been sold out and out, or where a decree in execution of the mortgage has been obtained against the property, and rights have thus sprung up with regard to the joint family estate, these rights are not to be defeated by the members of the joint family simply questioning the transaction entered into by its head."

After making these observations their Lordships refer to the case of *Suraj Bunsi Koer* v. *Sheo Persad Singh* (2) and to the case of *Chandradeo Singh* v. *Mata Prasad* (3). In connection with the observations referred to above, it is worthy of note that in neither of these two cases it was held that when a decree for sale of the family property is obtained by the mortgagee against the father alone, who was not sued as manager of the family, the sons cannot assail the decree by alleging that the mortgage debt was not for family necessity. It is further clear that the question which I have now to decide was not the question that formed the subject-matter of decision in the case of *Sahu Ram Chandra*, and I am, therefore, forced to the conclusion that the observations of their Lordships with respect to the binding nature of the mortgage decree were *obiter dicta*. However, those *dicta* of their Lordships are entitled to the greatest respect, and were it not for certain observations to be found in *Brij Narain's* case, I would have been prepared to hold that their Lordships took the view that was taken by Mr. Justice

(1) (1923) I.L.R., 46 All., 95. (2) (1879) I.L.R., 5 Calc., 148.
(3) (1909) I.L.R., 31 All., 176.

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DANIELS in the case referred to above. But in view of the observations of their Lordships in *Brij Narain's* case I have no hesitation in holding that their Lordships never intended to decide, or to lay down as a general proposition of universal application, that after the passing of a decree for sale the members of the joint family who were no parties to the suit for sale of the family property cannot challenge that decree without proving that the debt secured by the mortgage was contracted for immoral purposes. In *Brij Narain's* case their Lordships are reported to have observed at page 103 :—

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"There are, however, some observations in *Sahu Ram Chandra's* case, which are not necessary for the judgement, but which their Lordships are bound to say that they do not think can be supported."

Having regard to these observations of their Lordships I am not prepared to hold that their Lordships ever intended to lay down that the mere fact of a decree for sale having been passed precludes a Hindu son, who was not a party to the decree, from challenging that decree except on the ground that the mortgage debt was for illegal or immoral purposes. The second proposition of law laid down at page 104 in *Brij Narain's* case appears to me to be restricted to the case of a simple money debt incurred by, and a simple money decree obtained against, the father and has no reference to a decree for sale, and that proposition is based upon the obligation of Hindu sons to pay debts due from their father.

But, notwithstanding all that I have said, it appears to me that this appeal must succeed. The mortgage was executed by two persons named Bhagwant Singh and Imrat Singh. Imrat Singh died before the mortgage was put into suit, and his two sons were made parties to the decree. Bhagwant Singh, the father of the present respondent, was admittedly one of the defendants to the suit. If Bhagwant Singh and Imrat Singh were separate,

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and if Bhagwant Singh and the plaintiff respondent were the only members of the joint family constituted by them, the presumption must be that Bhagwant Singh was the manager and *karta* of the family. If he was the manager of the family, it must be presumed, unless the contrary is shown, that he was sued in his representative capacity, and the decree obtained against him must bind his son, the plaintiff respondent. On the other hand, if Imrat Singh was also a member of the joint family with Bhagwant Singh, the presumption must be the other way. When the manager of a joint Hindu family is impleaded as a defendant to the suit, the presumption is that he is sued in that capacity. But if along with the manager certain other members of the family are joined as defendants to the suit, the presumption must be the other way, because if the manager was being sued as representing the family, there could be absolutely no reason for joining some other members of the family as defendants in the suit. In the present case if the plaintiff respondent wanted to rely on the fact that Bhagwant Singh was not sued as manager of the family, it was up to him to state the facts clearly, and to prove that some persons, other than Bhagwant Singh and the plaintiff respondent, were members of the joint family in question and were arrayed as defendants in the suit in which the decree was passed. This was not done in either of the courts below, and, therefore, the ordinary presumption that the father represents the family must hold the field.

In this view of the case the decision of the Subordinate Judge was correct and ought to be restored.

BY THE COURT.—The order of the Court is that we allow the appeal, set aside the decree of the lower appellate court, and restore the decree of the trial court with costs in all courts.

Appeal allowed.

APPELLATE CIVIL.

Before Mr. Justice Mukerji and Mr. Justice Ashworth, and on a reference also before Sulaiman, J.

FAQIRA AND ANOTHER (PLAINTIFFS) *v.* HARDEWA AND OTHERS (DEFENDANTS).*

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July, 26. November, 3. December, 22.

Civil Procedure Code, order XXII, rule 4, sub-rule (3)—Abatement of appeal—How far abatement as regards one defendant affects the others—Act (Local) No. III of 1901 (United Provinces Land Revenue Act), sections 111(a) and 233 (k)—Partition—Ouster of jurisdiction of civil court.

A suit for a declaration of title was filed against two separate sets of defendants and was dismissed, and an appeal against this decision was also dismissed. The plaintiffs appealed to the High Court, and pending this appeal one of the defendants of the second set died and no steps were taken within time to bring his heirs on to the record. *Held* by SULAIMAN, MUKERJI, and ASHWORTH, JJ., (on a special reference as to how far the appeal had abated) that the appeal abated as to the second set of defendants, but not as to the first set, whose interests were separate and distinct from those of the second.

Held also by MUKERJI and ASHWORTH, JJ., that the suit, having been filed after the commencement of partition proceedings in a court of revenue, was not maintainable.

THE facts of this case were as follows:—

The appellants with two others instituted a suit for declaration of title. Their case was that in the khewat their proper share was 60 out of an entire quantity of 148 shares, the share of the defendants Nos. 1 to 3 was 79 out of the same quantity and of the defendants Nos. 4 to 8, seven out of the same quantity. According to the khewat the entire share was divided into 89 portions and the

*Second Appeal No. 1569 of 1925, from a decree of P. C. Plowden, Additional Judge of Meerut, dated the 9th of July, 1925, confirming a decree of P. C. Mogha, Subordinate Judge of Muzaffarnagar, dated the 12th of February, 1925.

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plaintiffs were recorded in respect of 3, defendants Nos. 1 to 3 in respect of 79 and the remaining defendants Nos. 4 to 8 with respect to 7 shares. The plaintiffs sought, as already stated, a declaration of title with the ultimate object of applying to the revenue court for correction of the khewat.

The suit was resisted by the defendants Nos. 1 to 3 alone and they maintained, *inter alia*, that the khewat was correct. The defendants Nos. 4 to 8 did not contest the suit.

The suit was dismissed on the ground of want of jurisdiction in the civil court because certain partition proceedings were pending in the revenue court. After the institution of the second appeal the defendant No. 4, Pat Ram, died and his heirs were not brought on the record. It was contended on behalf of the respondents that Pat Ram's legal representatives not having been brought on the record, the whole of the appeal had abated. The appeal having come before a Bench consisting of MUKERJI and ASHWORTH, JJ., the Bench, whilst agreeing that the appeal abated so far as the deceased respondent Pat Ram was concerned, differed as to how far this conclusion affected the continuance of the appeal as against the other respondents. The following question was therefore submitted to the Hon'ble the CHIEF JUSTICE with a view to its being decided by a larger Bench :—"In the circumstances of the present case, can the appellants be permitted to be heard in the absence of the legal representatives of the deceased Pat Ram?"

The point referred was then considered by a Bench consisting of SULAIMAN, MUKERJI and ASHWORTH, JJ., who, after hearing further argument, came to the unanimous decision that the appeal failed as against defendants Nos. 4 to 8, but not as against defendants Nos. 1 to 3.

The appeal then went back to the original Bench for disposal.

Babu *Piari Lal Banerji* and Babu *Surendra Nath Gupta*, for the appellants.

Dr. *Kailas Nath Katju* and Mr. *R. N. Gurtu*, for the respondents.

MUKERJI, J.—The plaintiffs in the court of first instance are the appellants before us. They instituted the suit out of which this appeal has arisen to obtain a declaration that the number of shares recorded in their favour in the khewat is too little, and that instead of there being 60 shares out of 146 shares they have been recorded as owning 3 shares out of 89 shares.

The suit was contested by the defendants Nos. 1 to 3 and was dismissed by the courts below on the ground of limitation and on the ground that maintenance of the suit was barred under the provision of section 233 (*k*) of the Land Revenue Act. The first court went into the merits of the matter and was of opinion that if there were no bar the plaintiffs were entitled to succeed. The lower appellate court has not gone into the merits of the case.

The two points that we have to consider are (1) whether the suit was barred by time, and (2) whether it was barred by section 233 (*k*) of the Land Revenue Act.

Point No. I.—It appears that there was a partition in the village at the instance of certain parties who are not before us. The shares of these people who had applied for partition were separated in 1324 F. (1st of July, 1916 to 30th of June, 1917). It was then that the entry in the khewat, now complained of, was made. The Plaintiffs stated in paragraph 9 of the plaint that they asked the defendants to get the khewat corrected, but they declined to do so. The plaintiffs, however, did not adduce any evidence to prove that they had actually made

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any request to the defendants to have the khewat corrected. We must, therefore, take it that there was no request made and no such request was refused. The question then is, what would be the date for starting limitation under article 120 of the Limitation Act?

It appears that the reason for the institution of the present suit was that on the basis of the alleged wrong entry in the khewat the defendants Nos. 1 to 3 filed an application in the revenue court for partition. This application was made on the 3rd of November, 1923, and the 21st of December, 1923, was fixed for the co-sharers, including the plaintiffs, to appear and file objections, if any, to the application for partition. On the 19th of December, 1923, the present suit out of which the appeal has arisen was filed. We have to take it, therefore, that the present suit was filed in order to prevent the defendants Nos. 1 to 3 from obtaining the benefit of the entry in their favour in the khewat by means of partition. No fact has been alleged or proved which establishes that previous to the filing of the application for partition the fact had been brought to the notice of the plaintiffs that there was a wrong entry in the khewat, and that advantage of that wrong entry was likely to be taken by the defendants Nos. 1 to 3. In the circumstances my opinion is that "the right to sue", within the meaning of article 120 of the Limitation Act, accrued to the plaintiffs on the filing of the application for partition and not earlier. In this view the suit would not be time-barred.

On the question as to whether the suit is barred by the provisions of section 233 (*k*) of the Land Revenue Act the position is this. The application for partition, as already stated, was made on the 3rd of November, 1923. On that application being made the revenue court became seised of the whole case as between the plaintiffs on the one hand and defendants Nos. 1 to 3 on the other. If any question of title arose between the parties, the

revenue court became competent to deal with it in certain ways mentioned in section 111 of the Land Revenue Act. If no question of title arose, the only thing that the revenue court had to do was to distribute the property in any manner it deemed fit, and the civil court would have no voice in the matter. Ordinarily, of course, a question of title has to be decided by the civil court, and the civil court alone. In order to avoid a conflict of jurisdiction, section 111 of the Land Revenue Act was framed. It gives the revenue court certain directions as to how to proceed in the case of a question of title being raised before it. Section 110 of the Land Revenue Act directs that the Collector, on receiving an application for partition, shall see if, on the face of it, it is in order and shall issue a proclamation if he finds that the application has nothing objectionable on the face of it. A date has to be fixed by the Collector, and on the date fixed, the co-sharers, if they are recorded in the khewat as such, have to appear before the Collector and to raise such objections as they may be advised. If the objection should relate to title, the Collector has one of three things to do: (*a*) decline to grant the application until the question in dispute has been determined by a court of competent jurisdiction, (*b*) ask any of the parties to institute, within three months, a suit in the civil court for the determination of such question, or (*c*) proceed to inquire into the merits of the objection. It will be noticed that the Collector, if he so wishes, can try the question of title himself. If he does not want to try the question himself, he can confer jurisdiction on the civil court by asking either of the parties to institute a suit within three months. This should exhaust the ways in which the question of title raised has to be decided, that is to say, either the Collector has to decide it or he should call upon any of the parties to institute a suit, but in that case the suit should be instituted in the civil court. Thus having exhausted the ways and means of having a question of

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title decided, the third course open to the Collector is to decline to grant the application as mentioned in clause (*a*) of section 111 of the Land Revenue Act. The question is what this clause (*a*) means. Does it mean that the Collector has to refuse the application for partition altogether or can he hold it in suspense till the question of title raised has been determined by a competent court? As I read the *whole of section* 111, the direction is that the Collector may dismiss the application *in toto* saying, as a part of his order, that an application like that shall not be maintained till it is armed with a decree of a competent court, which would ordinarily mean a civil court. This would prevent the presentation of another similar application for partition the next day. The idea is that a second or third application for partition shall not be maintained till the question of title raised has been finally determined by a competent court. The clause (*a*) may again mean that the Collector may keep the application in suspense, where, for example, a civil suit may already be pending between the parties at the date of the application. In my opinion, even in the latter case, the result would be the same, namely, the Collector would deny jurisdiction in himself to decide the question of title. It cannot be the case that simultaneously the question of title should be pending both before the revenue court and the civil court.

I am fortified in my reading of clause (*a*) to section 111 by this fact that we do not find any directions like those to be found in sub-sections (2) and (3) of section 111 with regard to the clauses (*b*) and (*c*) of sub-section (1). In the case of clause (*b*), sub-section (1), we find the provision in sub-section (2) that the Collector is told how he is to proceed if he has once taken action under clause (*b*). In the case of the Collector proceeding under clause (*c*), sub-section (1), he is told, by sub-section (3), how he is to proceed. But in the case of the

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Collector proceeding under clause (*a*) of sub-section (1), he is not told what he has to do. The only inference can be that, the Collector having declined to entertain the application for partition, no occasion for giving him any further direction arises. In other words, my reading of section 111 is this. First, the Collector declines jurisdiction where the ground for his declining jurisdiction for partition would be that the applicant has not got a decree of a competent court in support of his title. For example, a man whose name is not recorded in the khewat or a man whose name is recorded in the khewat for a small share but he asks for a larger share, comes with an application for partition. The Collector may say :—" I refuse to entertain your application. If you want to apply for partition, you must come armed with a decree of the civil court declaring that you are entitled to the share claimed or to the larger share ". Secondly, the Collector may assume jurisdiction, and in that case the question will be whether he will try the question of title himself, or whether he will have it decided by the civil court in the regular way. In the latter case he has to limit the time within which he would direct one of the parties to have the matter decided by the civil court. The reason is this that the partition application cannot be left pending indefinitely at the sweet will of a party. No party can say that he would institute the suit within, say, a year of the order. Thirdly, the Collector may assume jurisdiction himself and try the question of title himself. In that case he would decide it as if he were a civil court, with the further result that an appeal would lie to the District Judge or to the High Court as if from the judgement of a court of civil jurisdiction.

If this reading of mine of section 111 of the Land Revenue Act be correct, the Collector, on being told by the present plaintiffs that they had instituted a suit in the civil court, could not confer a jurisdiction on the civil

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court by simply saying, as he did in this case, " wait till such and such a date " (see the order quoted in the judgement of the first court). He could certainly proceed with the application, in spite of the fact that a suit had been instituted in the civil court. As I have already said, the Collector was authorized by the provision of section 111 of the Land Revenue Act to decide the question of title himself. To decide that question, therefore, he was a court of competent jurisdiction, as the application for partition had been made in his court before the suit for declaration was filed in the civil court. Section 10 of the Code of Civil Procedure came into play and the issue which arose for decision in either case could be tried by the revenue court alone. If, therefore, the Collector proposed (I do not think that he did propose to do so) to deny himself jurisdiction, he had to proceed in the regular way by bringing into operation clause (*b*) of section 111 and not otherwise. He was bound to record a formal order directing the present plaintiffs to institute a suit within three months of the order. The suit that had already been instituted was not within the jurisdiction of the civil court to entertain, and, therefore, was of no value. For the above reasons I agree with the courts below that the cognizance of the suit was barred and it was rightly dismissed.

I would dismiss the appeal with costs.

ASHWORTH, J.—I concur in the view of my learned brother that the suit was rightly dismissed under section 233 (*k*) of the U. P. Land Revenue Act. I would, however, also hold, in agreement with the lower courts' decision, that it was barred by limitation under section 120 of the Limitation Act. As regards the question of jurisdiction, the intention of the partition court underlying its order of the 4th of July, 1924, has to be observed from the surrounding circumstances. One of these circumstances is the law which should have been in the

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mind of the Collector. On that date the Collector was informed by the present applicant, that the applicant had filed a suit in the civil court for a declaration as to the shares to which he was entitled. On receiving this information the Collector passed an order in the following terms :—" Application filed and affidavit that a civil suit has been filed. Wait until the 21st of September, 1924 ". Now that was a correct and sufficient order if the appellant's suit for a declaration of title had been filed before the partition suit. It was not a correct order if the civil suit for such a declaration had been filed subsequent to the partition suit. In the latter case the Collector should have said that he was not concerned with such a suit inasmuch as the civil court was debarred from entertaining such a suit under section 233 (*k*) of the U. P. Land Revenue Act. The court should have then gone on to consider which of the three courses prescribed in section 111 of the Land Revenue Act it decided to employ. If it decided to employ the course allowed by clause (*a*), then it would have passed an order in the terms of clause (*a*) even if it did not specifically refer to that clause. The effect of such an order would have been to require the appellants to get the title to the shares determined by a civil court having jurisdiction. That would be in this case by a civil court not barred by section 233 (*k*). Section 233 (*k*) of the Land Revenue Act is a bar to the institution of a suit. It is not a bar merely to the continuance of a suit. When in that suit the defendants raised the plea of want of jurisdiction of the civil court under section 233 (*k*), they must have referred to the fact that the plaintiff had no right to institute the suit. If the plaintiff had no right to institute the suit, the defect could not be cured by an order *pendente lite* of the revenue court under section 111 (*a*). I hold that no order can be passed under section 111 (*a*) when a suit in the civil court for declaration of title has been insti-

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tuted before the partition suit, because the entertainment of the partition suit in that case would be barred by section 11 of the Code of Civil Procedure. If the application for partition has preceded the institution of the civil suit, that institution is bad and cannot be corrected by an order under section 111 (*a*) of the U. P. Land Revenue Act. If an order is passed under clause (*a*), then the only proper course for the plaintiff in the civil suit is to withdraw the suit already instituted by him and to file another suit. The former suit was barred by section 233 (*k*), but the latter suit would not be so barred owing to the obtaining of an order under clause (1) of section 111. I may remark that it is settled law that section 233 (*k*) read with section 111 of the Land Revenue Act means that a civil court cannot entertain a suit as to a declaration of title, when that title is a matter that can be determined and must be determined in a pending partition suit.

As to the question of limitation, I cannot agree that the institution of the partition suit by the respondent operated so as to give the appellant a right to sue. The appellant in his plaint set forth that the right to sue arose from a denial of his title by the respondent. He failed to bring any evidence to prove such denial. Consequently we must hold that there was no such denial. Again in the plaint the appellant never set forth that the bringing of the partition suit made it to the interest of the respondent to deny his title. The only ground on which he suggested in his plaint that the respondent was interested to deny his title, as distinct from the fact of his actually having denied it, was that the mistake in the khewat had been made and maintained. This mistake was made and obviously known to the appellant more than six years before the bringing of the declaration suit. Nothing has occurred since then, in my opinion, to give the respondent a greater interest in denying the appellant's alleged title than has existed all along. At any

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rate limitation must be decided on the plaint. It is nowhere alleged in the plaint that the fact of the respondent's bringing the partition suit gave him an interest in denying the plaintiff's title which he did not possess before. On this ground I would concur with the lower courts that the suit is barred by limitation.

On this ground, as well as on the other ground of jurisdiction, I concur that the suit should be dismissed.

BY THE COURT.—For the reasons given above the order of the court is that the appeal shall stand dismissed with costs.

Appeal dismissed.

Before Sir Grimwood Mears, Knight, Chief Justice and Mr. Justice Mukerji.

AZIZ AHMAD KHAN AND OTHERS (PLAINTIFFS) *v.* CHHOTE LAL AND OTHERS (DEFENDANTS).*

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Act No. IV of 1882 (*Transfer of Property Act*), *sections* 74, 82, 95 *and* 100—*Suit for contribution—Limitation—Act No. IX of* 1908 (*Indian Limitation Act*), *schedule* 1, *article* 132—"*Subrogation*"—"*Incumbrance*".

JR, being the owner of a large amount of immovable property, executed a number of mortgages on different dates and in favour of different mortgagees, and in several instances the same items of property were mortgaged more than once. One of these mortgages, dated the 23rd of September, 1899, was put in suit and a decree obtained thereon, when one *CL*, who was a party to the decree and was interested as a puisne mortgagee of one of the items included in the mortgage and also as a purchaser of the same, paid the whole of the decretal amount on the 19th of July, 1916. Thereafter *CL* sold all the rights which he had acquired by this payment to *AA* and others, who on the 25th of April, 1922, brought the present suit, asking for contribution as against several properties held by the defendants.

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*First Appeal No. 95 of 1924, from a decree of Ganga Nath, Subordinate Judge of Moradabad, dated the 13th of November, 1923.

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Held, that the suit was not barred by limitation. The right to contribution arose on the payment made on the 19th of July, 1916, and under article 132 of the first schedule to the Indian Limitation Act, 1908, the plaintiffs had twelve years within which to sue. *Raj Kamini Debi* v. *Mukanda Lal Bandapadhya* (1), dissented from. *Shib Lal* v. *Munni Lal* (2), *Ashfaq Ahmad* v. *Wazir Ali* (3) and *Har Prasad* v. *Raghunandan Prasad* (4), referred to.

Meaning of the term "subrogation" discussed. *Digambar Das* v. *Harendra Narayan Pandey* (5) and *Ahmad Wali Khan* v. *Shamsh-ul-Jahan Begam* (6), referred to.

Held also, on a construction of section 82 of the Transfer of Property Act, 1882, that the term "incumbrance" as therein used was not confined to mortgages, but included any other sort of incumbrance also. *Hari Raj Singh* v. *Ahmad-ud-din Khan* (7), referred to.

THE facts of this case are very fully stated in the judgement of the Court.

Dr. *Kailas Nath Katju*, Maulvi *Mukhtar Ahmad*, Pandit *Shiam Krishna Dar* and Munshi *Narain Prasad Ashthana*, for the appellants.

Mr. *Hamid Hasan*, Dr. *Surendra Nath Sen*, Babu *Piari Lal Banerji*, Munshi *Kailas Chandra Mital*, Munshi *Kamla Kant Varma*, Babu *Surendra Nath Varma* and Munshi *Shabd Saran*, for the respondents.

MEARS, C. J. and MUKERJI, J.—The appellants before this Court were the plaintiffs in the court below. They brought the suit out of which this appeal has arisen for recovery of Rs. 26,972-8-0 by sale of certain villages, and, in the alternative, for recovery of different items of money by way of contribution, to be enforced against certain properties held by some of the defendants.

The suit has been dismissed on two grounds, namely, one, that the plaintiffs did not put before the court sufficient materials to enable it to work out the respective

(1) (1920) 57 Indian Cases, 868.
(2) (1921) I.L.R., 44 All., 67.
(3) (1889) I.L.R., 14 All., 1.
(4) (1908) I.L.R., 31 All., 166.
(5) (1910) 14 C.W.N., 617.
(6) (1906) I.L.R., 28 All., 482.
(7) (1897) I.L.R., 19 All., 545.

burdens to which the properties might be liable, and the other, that the plaintiff has failed to implead certain people who are necessary for a proper determination of the suit.

The respondents support the judgement on these two points taken by the court below and also on the ground of limitation. The court found that the suit was not time-barred.

The points for determination in this appeal are :—

1. Whether proper parties are before the court and. if not, whether, with a view to the provisions of order 1, rule 9, of the Code of Civil Procedure, the court should not have added the necessary parties and then determined the suit?

2. Whether the record does furnish sufficient materials for a proper adjudication on the merits of the case?

3. Whether the suit should have been dismissed on the ground of limitation as well?

The facts of the case, so far as we are concerned with them in this appeal, are all admitted and are as follows.

One Jamil-ul-Rahman was the owner of considerable immovable property and was in a state of chronic indebtedness. He entered into eight transactions with respect to his properties, and they will be stated presently. The suit for contribution is based on the transaction No. 6 which will be detailed at its proper place. The transactions are :—

(1) On the 22nd of September, 1897, Jamil-ul-Rahman, whom we shall hereafter call the mortgagor, made a simple mortgage for Rs. 12,000 of five properties, namely, a house in Moradabad, the villages Nagla, Rasulpur, Ganwari and two other villages. The mortgage was in favour of one Parshadi Lal, who has died, but his

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legal representatives are on the record, as defendants Nos. 5 to 8.

(2) Jamil-ul-Rahman mortgaged, on the 10th of March, 1899, for a sum of Rs. 1,000, a five biswa share in village Shadipur in favour of one Ganpat Rai, whose legal representative is a party to the suit, as defendant No. 19.

(3) The mortgagor mortgaged, on the same date, namely, the 10th of March, 1899, another five biswa share of the village Shadipur for a sum of Rs. 1,000 in favour of Jawahir Lal, whose legal representative is on the record, among the defendants, as the defendant No. 20.

(4) Jamil-ul-Rahman mortgaged to Hargu Lal on the 11th of April, 1899, for a sum of Rs. 8,000, three items of property, namely, Asmauli mahal green, Asmauli thok Dhanno and the house mentioned in connection with transaction No. 1. Hargu Lal is a party to the suit as defendant No. 33. On foot of this mortgage of Hargu Lal, a decree was passed in his favour in suit No. 72 of 1911. In execution of the decree the property described as Asmauli mahal green was sold at an auction sale and was purchased by one Pahladi Lal, the defendant No. 35, for Rs. 40,000. This sale satisfied the mortgage entirely and left a balance in favour of the mortgagor.

(5) Jamil-ul-Rahman, on the 29th of July, 1899, mortgaged for Rs. 8,000 the three properties mentioned in connection with the transaction No. 4, along with three other properties, namely, Nagla, Munda Khera and a grove in the village of Asmauli. Hargu Lal filed a suit which was numbered as 219 of 1911 and got a final decree for sale. One Chhote Lal, a party to the decree, who was a subsequent mortgagee of the village Nagla and who had purchased a part of it, satisfied the decree by a

payment in full on the 12th of August, 1916. The amount he paid was Rs. 31,734-4-0. Chhote Lal's mortgage was dated the 10th of March, 1908. He became a subsequent purchaser of the village Nagla through *benami* purchases and later through direct purchases. These facts are however not very material for our present purposes. Chhote Lal, having paid off the decree of Hargu Lal, No. 219 of 1911, sold off his rights acquired by the payment to one Shafi Ahmad. Before he did this, he took a sum of Rs. 10,000 from one Hidayat Ali and purported to release the property in his hand from liability.

(6) Jamil-ul-Rahman made a mortgage of ten items of property in favour of the same Hargu Lal, on the 23rd of September, 1899, for a sum of Rs. 5,000. On foot of this mortgage the decree No. 220 of 1911 was passed, on the 26th of July, 1911. The properties mortgaged were :—

(*a*) Nagla, (*b*) Jalalabad, (*c*) Munda Khera, (*d*) Asmauli mahal green, (*e*) Asmauli thok Dhanna, (*f*) Asmauli thok Sarjit, (*g*) The grove in Asmauli, (*h*) Shadipur, (*i*) Inayatpur, and (*j*) House in Moradabad.

Having obtained the final decree on the 16th of May, 1914, Hargu Lal took out execution of his decree. Chhote Lal, who was again a party to the decree, as a puisne mortgagee of village Nagla, and as a subsequent purchaser of the village, paid in full the decretal amount which exceeded Rs. 20,000, on the 19th of July, 1916. He, thereafter, sold all the rights that he acquired by such payment to the plaintiff No. 1 and Tahauwar Shah Khan, the predecessor in title of the remaining plaintiffs. The plaintiffs sought to recover Rs. 26,000 and odd, as is stated in the beginning of the plaint, by the sale of the items (*h*) and (*i*) alone, on the ground that other properties were subject to prior mortgages. This portion of the claim has been abandoned and is no longer before us.

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(7) Jamil-ul-Rahman mortgaged to one Ganga Dei on the 21st of April, 1901, the five items of property which were mortgaged in transaction No. (1) to Parshadi Lal and, along with them, the village of Bundra. Musammat Ganga Dei paid off Parshadi Lal's mortgage, and having brought a suit for sale, sold some property, and her decree was satisfied.

(8) Jamil-ul-Rahman mortgaged to Dharam Das for Rs. 8,000, on the 23rd of February, 1901, Shadipur and Bhojra. Dharam Das filed the suit No. 173 of 1913 and proceeded to execute his decree. At the instance of Chhote Lal, such rights as he had acquired by satisfaction of decree No. 220 of 1911 (mentioned above) were notified, and one of the properties mortgaged, namely, Shadipur was sold, subject to Chhote Lal's charge. The decree-holder or his representatives purchased the property and paid off the incumbrances Nos. (2) and (3) mentioned above. Defendants Nos. 21 to 24 are the legal representatives of Dharam Das.

The plaintiffs' claim now is that their predecessor in title, Chhote Lal, discharged the burden created by the transaction No. (6) on the several properties mortgaged on the 23rd of September, 1899. They claimed that the respective owners should make good the sums that may be found recoverable from the several properties, and, in default, the moneys may be realized by sale of the several properties.

We now proceed to consider the several points that have been set forth above as arising for determination at the present stage of the litigation.

The first point is one of limitation. We have already said that the claim to enforce the payment of money by sale of two properties has been abandoned before us. This relief had been claimed on the ground that Chhote Lal, having satisfied the decree passed in favour of Hargu Lal on foot of the mortgage of the 23rd

of September, 1899, (transaction No. 6), had stepped into the shoes of the mortgagee Hargu Lal and was, therefore, entitled to recover by suit the money actually paid by him, from all or some of the properties mortgaged under the said transaction No. (6). The plaintiff sought to exclude 8 out of the 10 properties on the ground that they were either sold in execution of a prior mortgage or were subject to prior mortgages. We need not consider whether the claim to enforce the original mortgagees' rights by Chhote Lal, or his legal representatives, would be barred by time or not. The learned Subordinate Judge held, in accordance with a judgement of this Court in *Shib Lal* v. *Munni Lal* (1), that such a suit would not be time-barred. We need not express any opinion at present as to how far this case was rightly decided. It would probably be necessary to re-consider the law laid down there, when a suitable occasion arises. The contention, however, before us is not whether a puisne mortgagee, by paying a prior mortgage, gets 12 years' time from the date of payment within which to enforce his newly acquired rights. The question before us is whether Chhote Lal, having paid the decretal amount, not as a puisne encumbrancer, but as a purchaser of the village of Nagla, was entitled to exact contribution from the remaining 9 properties; and whether this claim for contribution is within time. We have already said that Chhote Lal acquired the property of Nagla. It is stated in the judgement of the court below, and it was admitted before us, that Chhote Lal had, prior to the deposit of the decretal amount, become, by certain *benami* purchases, the owner of a part at least of Nagla. His right to contribution has not been denied before us and it has not been contended that Chhote Lal's right to contribution has not passed to the plaintiffs. We, therefore, proceed to consider the question on the

(1) (1921) I.L.R., 44 All., 67.

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basis of the fact that a right of contribution does exist in the plaintiffs, who stand in the shoes of Chhote Lal.

The payment by Chhote Lal of decree No. 220 of 1911 was made on the 19th of July, 1916. It is claimed for the plaintiffs that their suit for contribution is within time, having been brought within 12 years of the 19th of July, 1916. The contention of the respondents is that by satisfaction of the mortgage decree, Chhote Lal was subrogated to the position of Hargu Lal as a mortgagee of the date 23rd of September, 1899; that the plaintiffs' right to enforce the contribution was virtually a right to enforce the mortgage of the 23rd of September, 1899, and that the suit having been instituted more than 12 years from 1899 is barred by time. Reliance has been placed on a Calcutta case, *Raj Kamini Debi* v. *Mukanda Lal Bandapadhya* (1). We have carefully examined the case, but are unable to agree with it.

The argument that found favour with the learned Judges of the Calcutta High Court was this. A puisne mortgagee who satisfies a prior mortgage is subrogated to the position of the prior mortgagee, and in order to enforce the rights acquired by him on such payment under section 74 of the Transfer of Property Act he has the same period of limitation as the mortgagee who has been redeemed. This, in our opinion, is a correct proposition, though it militates against the view taken in this Court in the case of *Shib Lal* v. *Munni Lal* (2), quoted above. It was pointed out that where a usufructuary mortgage is redeemed by one of the mortgagors, and he obtains possession of the property, the period of limitation within which his co-mortgagor can redeem his share of the mortgaged property from the co-sharer who has already redeemed the entire property is the same as has been prescribed for the redemption of the original mortgage. This is again a right proposition of law and

(1) (1920) 57 Indian Cases, 868. (2) (1921) I.L.R., 44 All., 67.

is supported by the Full Bench case of this Court, namely, *Ashfaq Ahmad* v. *Wazir Ali* (1). Further it was pointed out that where one of the mortgagors redeems a prior mortgage, he is subrogated to the rights of the prior mortgagee and on that account has a priority, in enforcing a right of contribution, over a transferee of a co-mortgagor, although the actual payment that gave the plaintiff a right to enforce contribution was made subsequent to the mortgage made by the co-mortgagor. This is in accordance with a decision of this Court in *Har Prasad* v. *Raghunandan Prasad* (2) and is, undoubtedly, a correct proposition of law. On the basis of these three statements of law it was held, in the case of *Raj Kamini Debi* v. *Mukanda Lal Bandapadhya* (3), that a suit to enforce contribution is a suit to enforce the rights of the prior mortgagee and that therefore the remedy of the prior mortgagee must be availed of within the period within which the prior mortgagee could enforce his remedies. The learned Judges recognized that this view might be hard in certain cases, but remarked that they were unable to come to any other conclusion.

With due respect, it appears to us very clearly that the learned Judges have missed the point. We have to look to the principles on which the first three propositions of law, enunciated above, are based, and we shall at once see why in the case of a suit for contribution a different rule must apply.

Before we proceed further, it will be important to note that the word "subrogation" is not to be found within the four corners of the Transfer of Property Act. The word "subrogation" means substitution. The rule of substitution has been adopted and applied by courts of equity, on the principle—"He who seeks equity must do equity". If a certain party owning property and his property are relieved from a certain liability, it

(1) (1889) I.L.R., 14 All., 1. (2) (1908) I.L.R., 31 All., 166.
(3) (1920) 57 Indian Cases, 868.

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is the duty of the owner to see that the party who relieves is not allowed to suffer. This is the principle of subrogation. Now let us examine the three principles from which the learned Judges of the Calcutta High Court thought that the fourth proposition followed.

Where a puisne mortgagee redeems a prior mortgage, he acquires the rights of the prior mortgagee. This is under section 74 of the Transfer of Property Act. By such payment the puisne mortgagee, redeeming the prior mortgagee, only temporarily relieves the subsequent mortgagees or the mortgagor from the burden of the earlier mortgage. He is allowed to step into the shoes of the prior mortgagee only in order that he might enforce the very remedies which were open to the prior mortgagee. There is no reason why a redemption by him should extend the duration of the liability of the mortgagor or subsequent mortgagees, by extending the period of limitation. There is no principle, therefore, on which the remedy of the prior mortgagee could be extended for the benefit of the puisne mortgagee making the payment. In this connection the case decided in this Court, namely, *Shib Lal* v. *Munni Lal* (1), may have to be considered again. The learned Judges in this case thought that the subsequent mortgagee, by making the payment, came within the purview of section 95 of the Transfer of Property Act and by the act of payment acquired a charge over the properties redeemed by him. If we read section 95 of the Transfer of Property Act, we shall at once see that this section has no application whatsoever to the case of a puisne mortgagee satisfying the prior mortgage. The learned Judges remarked that they were applying the principle underlying section 95 of the Transfer of Property Act and that it had been held that it was not exhaustive. The learned Judges evidently had in their mind the case of *Ahmad Wali Khan* v. *Shamsh-ul-Jahan Begam* (2) decided by their Lordships

(1) (1921) I.L.R., 44 All., 67.

(2) (1906) I.L.R., 28 All., 482.

of the Privy Council, where it was held that, although it might be said that section 95 applied only to the case of usufructuary mortgages, it could be read and it should be read as applying to all classes of mortgages. We are not aware of any case in which it has ever been held by the Privy Council that section 95 of the Transfer of Property Act applied to the case of a payment made by a puisne mortgagee.

The second proposition of law is that where one of the mortgagors redeems a prior mortgage and obtains possession from the mortgagee, a co-mortgagor can redeem him only within the period within which he could redeem the original mortgagee. This is so because the redemption by one of the mortgagors does not serve in any way to extend the period of limitation in favour of the co-mortgagor. The co-mortgagor had the usual 60 years' period of limitation for redemption. The fact that a co-mortgagor by redemption has stepped into the shoes of the mortgagee and has been allowed to hold the property, other than his own, as a security for enforcing payment by his co-mortgagors, is no ground for granting an indulgence to the co-mortgagor who wishes to redeem later, by extending the period of limitation.

The third proposition of law is that a mortgagor who redeems a joint mortgage is entitled to the priority of the mortgagee as against a subsequent transferee of the co-mortgagor. This is so because the burden that has been relieved was of a debt prior in date to the subsequent encumbrance and the party who has relieved the earlier burden cannot be allowed to suffer.

The doctrine of subrogation has been applied for the *benefit* of a party making the payment in suitable cases and cannot be applied to the *disadvantage* of that party. Where a suit is brought to enforce a contribution, which is based on the maxim "equity is equality", it is only partially right to say that the party making

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the payment and relieving the co-mortgagor's property from burden is subrogated to the position of the mortgagee. It is clear that he cannot enforce the right of the mortgagee to sell all or any of the properties to realize the entire money recoverable by him. The mortgagee would be entitled, without any restriction, to enforce the payment of the entire mortgage money against any one of the properties he might choose to proceed against; but the mortgagor seeking contribution has to exempt his own property (if it has not been sold) and must bear a proportionate part of the mortgage money. Then, he has to split up his claim and must ask for a proportionate payment from the owners of the remaining properties. Properties would contribute, some more and others less, according to the respective values of the properties. Thus it is clear that a co-mortgagor seeking contribution is not exactly in the same position, in all respects, as the mortgagee whom he has redeemed. It was held in a Calcutta case, *Digambar Das* v. *Harendra Narayan Pandey* (1), that how far a party seeking contribution is to be subrogated to the position of the mortgagee redeemed must depend according to the circumstances of the case. We approve, (with respect), of some of the remarks made in that learned judgement. At page 623, col. 1, will be found the following :

> " It is only by a fiction of law that the mortgagor who redeems the security is substituted in the place of the original creditor, and although it is sometimes said that the substitute is put in all respects in the place of the party to whose rights he is subrogated, even a superficial consideration will show that the statement is too broad and requires qualification ".

The learned Judges quote authorities for their statement in column 2 of the same page, namely, " the extent to which subrogation would be carried in a particular case must be governed by equitable considerations".

(1) (1910) 14 C.W.N., 617.

This is a statement of law with which we agree. Then the learned Judges say :—"If, therefore, one of several mortgagors satisfies the entire mortgage debt, though upon redemption he is subrogated to the right and remedies of the creditor, the principle has to be so administered as to attain the ends of substantial justice regardless of form; in other words, the fictitious cession of the rights and remedies of the creditor in favour of the person who effects the redemption, operates only to the extent to which it is necessary to apply it for his indemnity and protection ". This statement of the law is undoubtedly correct.

There can be no doubt that where a right of contribution exists, that right comes into play only when a payment is made. It would be absurd to say that although the right to exact contribution arose in Chhote Lal on the 19th of July, 1916, the limitation against him had begun to run on the 23rd of September, 1899, (the date of the mortgage), and that it had already been time-barred on the 23rd of September, 1911, i.e., even before the right accrued.

The principle of subrogation may have been applied and adopted by the Transfer of Property Act in certain cases, but the law that actually governs is that which is enacted within the four corners of the Transfer of Property Act. The maxim of law is well known, viz., " where there is law, there is no equity ". Where legal rules are clear, equitable rules cannot be applied. Supposing, therefore, that equity would require that Chhote Lal's right to contribution should be co-extensive with Hargu Lal's right, we have to be governed by the provisions of sections 82 and 95 of the Transfer of Property Act read with section 100 of the same Act. The right of contribution in India, where the Transfer of Property Act is enforced, arises under the provisions of section 82 of the Act. Under the view expressed by their Lordships

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of the Privy Council in the case of *Ahmad Wali Khan* v. *Shamsh-ul-Jahan Begam* (1) quoted above, section 95 is equally applicable. On the satisfaction, therefore, of a mortgage by a co-mortgagor, a charge arises in favour of the person making the payment and that charge can be enforced under section 100 of the Transfer of Property Act. Thus we have the clearest sanction for holding that the right to enforce arose on payment and, under article 132 of the Limitation Act, the person making the payment has 12 years within which to enforce the charge.

We hold, in disagreement with the case of *Raj Kamini Debi* v. *Mukanda Lal Bandapadhya* (2), that the suit is not time-barred.

The second and third points may be taken together. The argument that has found favour with the learned Subordinate Judge is this. Some of the properties which are the subject-matter of the 6th transaction were dealt with by previous mortgages. Under section 82 of the Transfer of Property Act, each property is liable to contribute proportionately to its value. The value of a particular property is to be determined, where it is subject to "any other incumbrance", by deducting from the actual value of the property the "amount of such incumbrance". It is argued that "incumbrance" means mortgage and that the "amount of the incumbrance" must be taken to be the proportionate charge that would exist on a property, if it happened to be previously mortgaged along with other properties. To illustrate the meaning, if properties C, D and E are subject to a particular mortgage and, for purposes of contribution, their values have to be determined, we must see whether these or any of these properties are subject to any prior mortgages and what are the properties along with which they have been mortgaged. Then we have to determine what would be the proportionate liability under the prior mortgage of each of these properties. This argument, which

(1) (1906) I.L.R., 28 All., 482. (2) (1920) 57 Indian Cases, 868.

found favour with the learned Subordinate Judge, appears to us to be unsound and opposed to the plain words of section 82 of the Transfer of Property Act.

To start with, the word "incumbrance" does not necessarily mean a mortgage. The word incumbrance has not been defined in the Transfer of Property Act and we must interpret it in the manner in which it has been used in legal parlance. Wharton, in his Law Lexicon, defines it as " a claim, a lien or liability attached to property; as a mortgage, a registered judgement, etc." If this definition be correct, and we must assume that it is correct, we shall see that a mortgage is not the only thing which can be described as an incumbrance. Stroud, in his Judicial Dictionary, points out that a lease might be an incumbrance in certain cases. We have no doubt that the word incumbrance has a larger meaning than a mere mortgage. The Transfer of Property Act deals largely with mortgages and if, by the use of the word incumbrance the framers of the Act meant only a "mortgage", nothing would have been easier for them than to use the word mortgage and not the word "incumbrance". Where, out of one of the properties mortgaged, an estate, say, in the shape of a permanent lease, has been carved out before the making of the mortgage, out of the satisfaction of which the question of contribution arises, the value of the property mortgaged, for the purpose of contribution, must necessarily be the value of the property minus the value of the permanent lease. The owner, before the mortgage, may have very much impaired the value of his property by the execution of a permanent lease of a considerable portion of the estate. In the circumstances the value for the purposes of contribution must be determined by deducting the value of the lease from the market-value of the property as a whole. Then, again, a property mortgaged may be subject to an attachment at the date of the mortgage. The

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attachment will be an "incumbrance" if it be still subsisting at the date of enforcement of contribution. If this view of the word incumbrance be right, it is clear that the framers of section 82 were not contemplating only prior mortgages when they used the word incumbrance. This would considerably diminish the weight of the defendant's argument that the " amount of an incumbrance " was meant to be the proportionate amount of mortgage money which could be attributable to a property in a suit for contribution.

Where the language of a statute is plain in itself, it is not open to the interpreter to add to it or to deduct from it or even to consider whether the rule is likely to create hardships in particular cases if it be read in its ordinary sense. The words themselves alone must be considered, to see the intention of the law given. (See page 66, Craies' Statute Law, edition of 1923; Broom's Legal Maxims, edition of 1924, p. 343).

To give effect to the contention of the defendants, we have to add considerably to the language of section 82. Assuming that the word incumbrance has been used in a much narrower sense, namely, in the sense of mortgage alone, the amount of an incumbrance or mortgage will be what has been described in the Transfer of Property Act itself as " the mortgage money ", namely, the principal amount and the interest. If we ask ourselves the question, " what is the amount of a prior mortgage on a particular property?", we would readily get he answer, which would indicate the total amount of the mortgage money. Nobody would think of saying " although the total amount of mortgage money recoverable from this property is Rs. 10,000, yet, because with this property several others have been together mortgaged, the mortgage money on this property is really Rs. 2,000." We cannot, except by doing violence to the language of the section, read the words " amount of

any other incumbrance" as meaning "the amount which would be payable by the property, having regard to the proportionate value of this property, and any other property which may be subject to the same mortgage."

It has been urged that if we do not accept the defendants' interpretation, we shall be doing great injury to the defendants, inasmuch as some of the properties which have been more than once mortgaged will practically escape from contribution. For example, it was pointed out that the house property has been subject to three previous mortgages, namely, transactions Nos. (1), (4) and (5), and that the total amount of the mortgage money payable under them would be no less than Rs. 28,000. It is urged that the house would practically be worth nothing if we attempt to deduct Rs. 28,000 from the value of the property. In fact, the property has been valued at only Rs. 6,000. This argument need not deter us. There are several answers to this objection. The argument comes to this only, that of we read section 82 naturally, we shall be obliged to exclude some of the properties which are heavily encumbered from contribution. When the sixth mortgagee accepted some of the heavily incumbered properties as his security, and, when the mortgagors gave those properties as a part of the security, both the mortgagors and the mortgagee knew that the value of those properties, *as security*, was worthless. The prior mortgagees could easily enforce their claims against the house alone. If the house escaped the attack of the first mortgagee, it was not likely to escape the attack of the second or the third mortgagee. If we consider supposed cases of "hardship," we can point out the possibility of similar supposed hard cases if the interpretation contended for on behalf of the defendants were adopted. This very case illustrates the hardship of the interpretation contended for by the defendants. In spite of making 36 people parties to the suit and in spite

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of bringing on the record a mass of evidence, the plaintiffs have been told that more people are necessary as parties and more evidence as to properties is necessary. We must remember that we are construing a rule of law and are not legislating. We have already said that if the language of the statute be plain, it is not open to us to consider whether that language would create any hardship or not. If there be hard cases, they may be good reasons for altering the law, but they cannot be good reasons for putting a meaning to the language which it does not bear.

Further, we find that the rule that has been enacted in section 82 is liable to be abrogated or modified, *by the mortgagors themselves*. There appear in the section the very important words, " in the absence of a contract to the contrary ". Where it is intended by the different owners of several properties that each and every item should be liable to contribute in a manner different from the one described in section 82, it would be open to them to agree among themselves to that effect. The legislature provided for a rule only where the mortgagors, among themselves, or the mortgagors among themselves and the mortgagee (assuming that the mortgagee too has a voice in the contract for contribution), did not come to any terms. We can easily conceive that the legislature decided to lay down a simple rule in simplest possible language and left it to the parties to the transaction to lay down any different rule for themselves if they wanted any such different rule.

We are clearly of opinion that there is no justification for reading the word " incumbrance " as " mortgage" and that, further, there is no jurisdiction for holding that the words " amount of any other incumbrance " mean " proportionate mortgage money payable according to a rule of contribution ".

Only one case has been cited to us as an authority for the defendants' contention and that is the case of

Hari Raj Singh v. *Ahmad-ud-din Khan* (1). We have carefully considered the case, but do not find anything in it to induce us to regard it as an authoritative pronouncement on the interpretation of section 82 of the Transfer of Property Act. The first thing that we have to observe in the case is that it does not appear that the parties put different constructions on section 82 (as before us) and the learned Judges were called upon to pronounce an opinion as to which of the constructions was right. The learned Judges merely proceed to show how contribution should be calculated. It does appear, no doubt, from the judgement of the learned Judges, that the amount of the prior mortgage which was directed to be deducted from a particular property was a "proportionate amount" as contended for on behalf of the defendants. But it is also the case that the learned Judges proceeded to altogether exclude from consideration certain properties which had been sold in execution of prior mortgage decrees; and, thereby, adopted the interpretation contended for on behalf of the appellants before us. If we adopt the principle of " proportionate charge ", there is no reason whatsoever for excluding from calculation the values of the properties sold in execution of prior mortgages. It is true that those properties could not be made liable, but if they are made to bear, in the calculation, a proportionate part of the prior incumbrance, the prior incumbrance on unsold properties would diminish. It is clear, therefore, that the learned Judges who decided the case never felt called upon to decide as to whether section 82 was capable of two different interpretations.

For the foregoing reasons we are of opinion that the learned Judge of the court below was wrong in believing that it was incumbent on him to find out, in the case of each prior mortgage, what were the properties

(1) (1897) I.L.R., 19 All., 545.

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mortgaged along with any of the items mortgaged under the sixth transaction, what were the values of those properties, who were the owners of those properties and so on. The learned Judge need not have troubled himself with such a wide inquiry and should have confined himself to the inquiry as to the amount of the mortgages (as explained above) under which particular properties were liable.

If our view be correct, it is possible, nay it is probable, that, with the materials on the record and the parties before the court, the latter would be able to come to a proper adjustment of the liabilities of the several properties owned by the parties to the suit.

In the result, we set aside the decree of the court below and remand the suit to the learned Subordinate Judge with the direction that he shall restore the suit on its original number and proceed to dispose of it according to law, having regard to the foregoing remarks in our judgement. The costs here and hitherto will abide the result.

If the learned Judge in the court below should still find that certain necessary parties are not before him, having regard to the provisions of order I, rule 9, of the Code of Civil Procedure, he must bring those parties on the record (subject to such orders as to costs as he may deem fit to pass) and proceed to try the suit.

Appeal allowed and suit remanded.

MISCELLANEOUS CIVIL.

Before Justice Sir Cecil Walsh and Mr. Justice Banerji.

IN THE MATTER OF CHANDRA SEN JAINI.* 1928

January, 4.

Act No. XI of 1922 *(Indian Income-tax Act), sections* 22 *and* 23—*Income-tax—Notice under section* 22(4) *served on assessee after he has made a return—Non-compliance—Powers of income-tax officer.*

If an assessee has made a return in compliance with a notice under section 22 (2) of the Indian Income-tax Act, 1922, and thereafter a notice has been served upon him under section 22 (4) and the assessee has failed to comply with that notice, the Income-tax Officer is entitled to make an assessment under section 23(4) on account of that failure and he is not bound to proceed under section 23 (3). *Brijraj Ranglal* v. *Commissioner of Income-tax* (1), dissented from.

THIS was a reference made by the Commissioner of Income-tax under section 66 of the Indian Income-tax Act, 1922. The facts of the case are thus stated in the Commissioner's order :—

1. Lala Chandra Sen Jaini, a *Vaid* of Etawah, duly filed his return of income for the current year, stating his income to have been Rs. 300 from property and Rs. 3,000 from business, and adding that he kept no accounts, that his business was that of a *Vaid*, that he could not complete the form in detail, and that his return was an estimate.

2. When the Income-tax Officer came to make the assessment, he issued a combined notice under section 22 (4) and section 23 (2) of the Income-tax Act in the form attached (Appendix A), asking Lala Chandra Sen Jaini (1) to produce or cause to be produced his account books for the previous year and (2) to produce or cause to be produced evidence in support of his return.

*Miscellaneous Case No. 1027 of 1927.
(1) (1927) A.I.R., (Pat.), 390.

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3. The assessee appeared before the Income-tax Officer and stated on oath that he had no accounts or *bahikhatas* of any sort whatsoever, but, on being questioned, admitted that he did maintain a register in which were recorded the names of the persons to whom parcels were sent by post value-payable and also the amounts of money so realized. The Income-tax Officer asked the assessee to produce that register, no matter what its condition was, but the assessee declined to do so. The Income-tax Officer accordingly framed an assessment under section 23 (4) of the Income-tax Act.

4. The assessee subsequently presented an application under section 27 in the following terms :—

"Respectfully it is submitted that the applicant was required to file his account books, but since he kept no regular account books he could not file any. The applicant has been assessed to pay Rs. 904-11, which is very excessive. The applicant does not sell any medicines in the city. All his medicines are sent outside by means of parcels. A parcel journal is kept by the applicant, which will show the total amount of medicines sold by him.

The applicant never thought that this journal could afford a reasonable basis for assessment, but his legal advisers have advised him to file this journal. This journal contains all the sales by the applicant, and, by taking average profits per cent., a fairly accurate income of the applicant can be obtained.

It is therefore prayed that the court be pleased to reconsider the case in the light of the parcel journal and to assess the applicant accordingly."

The Income-tax Officer held that the condition postulated in section 27 was not fulfilled, i.e., that the assessee had not been prevented by sufficient cause from complying with the notice under section 22 (4), and rejected the petition.

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5. The assessee appealed to the Assistant Commissioner of Income-tax, who rejected the appeal on the 11th of August, 1927.

6. About this time a case, *Brijraj Ranglal* v. *Commissioner of Income-tax*, was decided by the Patna High Court, which ruled that the notice under section 22 (4) of the Income-tax Act can only be issued before a return of income is filed and that failure to produce accounts in response to a notice issued after submission of a return does not render the assessee liable to an assessment under section 23 (4). The assessee noticed a report of this case in the newspapers of the 13th of August, 1927, and has presented a petition claiming that the assessment should have been made under section 23 (3) and not section 23 (4), and praying the Commissioner to set aside the assessment or to state a case to the High Court. Strictly speaking, the demand for a reference does not arise out of the appellate order. But the matter is of importance and, although the judgement of the Patna High Court has no force in this province, it is desirable that the point should be settled authoritatively.

7. The Commissioner, therefore, states a case on the following point:—

If an assessee has made a return in compliance with a notice under section 22 (2) of the Indian Income-tax Act, 1922, and thereafter a notice has been served upon him under section 22 (4) and the assessee has failed to comply with that notice, is the Income-tax Officer entitled to make an assessment under section 23(4) on account of that failure, or is he bound to proceed under section 23 (3)?

8. The Commissioner is of opinion that the ruling of the Patna High Court is not correct and the answer to the first part of the question is in the affirmative and to the second part in the negative.

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APPENDIX A.

Form B.

Notice under section 23, *sub-section* 2 (*and section* 22, *sub-section* 4) *of the Indian Income-tax Act, XI of* 1922.

(For use where a return has been made).

No. *Dated the* 192

To

To enable me to test the correctness of the return of your income furnished by you under section 22, sub-section 1, / sub-section 2, / sub-section 3, of the Act for the year ending , I hereby require you to attend at my office at at on in person or by representative (and / or) to produce or cause to be produced at the said place and time the accounts and documents specified overleaf *and any other evidence on which you may rely in support of the return*).

Wilful failure to comply with this notice will entail the forfeiture of your right of appeal under section 30 (1) of the Act and will render you liable to prosecution under section 51, sub-section (*d*) of the Act.

Income-tax Officer.

Particulars of accounts and documents :—

Upon this reference—

Munshi *Baleshwari Prasad*, for the applicant.

Pandit *Uma Shankar Bajpai*, for the Crown.

WALSH and BANERJI, JJ.—This is a case stated by the Income-tax Commissioner. The assessee, one Lala Chandra Sen Jaini, a *vaid* or physician of Etawah, filed a return of his income for the current year, stating that he kept no accounts and that his return was an estimate. The Income-tax Officer, presumably having reason to think that the assessee was not giving that attention to his return which, we hope, he gives to his patients,

served a double notice upon him, one under section 22 (4) requiring him to produce accounts and documents in support of his return, and another under section 23 (2) requiring him either to attend or to produce evidence in support of his return. The notice issued is headed "Form B". It is a double form calling upon the assessee to do two things; to produce documents to enable the correctness of the return to be tested and to attend and give any evidence the assessee may desire to give. This double form, which is a useful and practical way of combining two stages into one, is headed "Form B". We have been unable to ascertain, either from the Manual in use in these provinces, or from the gentlemen who have argued the case before us, whether it is a statutory form or merely a form with no greater authority than that of the department from which it issues. But it is no without significance that one of its sub-titles is in the following terms:—"For use where a return has been made". The question whether a double form like this, and the practice of combining two stages into one, is strictly lawful is not before us. It certainly ought to be. It must be a great saving of time to an assessee, especially if he is honest and wants to be truly assessed and to pay the proper proportion of his contribution to public funds, and it must also be of great advantage to the taxing authorities, to have one comprehensive and final stage of inquiry where an assessee, whose return has been challenged, can produce all his documents in support of his return and give any evidence on which he relies. The assessee complied with the notice which required him to attend under section 23, presumably because he was advised that if he did not he would have the very assessment made against him of which he complains, but he did not comply with the part of the notice requiring him to produce his documents, apparently relying upon an authority of the Patna High Court, which he was advised would enable him to withhold them from the taxing authorities. But the result of his attendance

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to give evidence was to show that his statement in his original return was a falsehood. He had said that he kept no accounts. He did. When he was put upon oath, he admitted that he kept a register with the names of his customers and the amounts realized. He made the feeble and obviously dishonest excuse that he had not produced the register because the accounts were not clearly entered. It is to be observed that he was not called upon to produce accounts which were clearly entered, or anything which he might, as the sole judge of the matter, consider worthy of being produced, but he was called upon to produce such accounts and documents as he had, it being immaterial whether the accounts were clear or not or whether they were what would be considered regular and perfectly kept accounts; he finally said that he did not wish to produce them. He was thereupon assessed by the Income-tax Officer to the best of his judgement under section 23 (4). The question is whether the Income-tax Officer had jurisdiction to do that. It seems to us that if he had not, the careful provisions of sections 22 and 23, for the purpose of preventing fraud and concealment, would be useless and that the machinery provided for the purpose of making people pay their real quota would break down. The machinery provided by these sections for extracting a reasonable contribution out of assessees in default is aimed precisely at the conduct of which this assessee has been guilty, but we have to see whether his dishonest attempts to evade his liability are protected by the law. The sub-section in question, section 23 (4), is as follows :—

"If the principal officer of any company or any other person fails to make a return under sub-section (1) or sub-section (2) of section 22, as the case may be, or fails to comply with all the terms of a notice issued under sub-section (4) of the same section or, having made a return, fails to comply with all the terms of a notice issued under sub-section (2) of this section, the Income-tax Officer shall make the assessment to the best of his judgement".

That sub-section contemplates three contingencies. The first, the failure to make a return at all; the second, the failure to comply with a notice requiring production of accounts or documents required by the Income-tax Officer; and the third, the failure to attend at the Income-tax Officer's office, or to produce evidence on which the assessee relies. In each of these three cases the assessee is a person in default, and he can only become in default by a deliberate breach of an express provision to which the penal section which we have just cited in each case refers. It must be admitted that the assessee in this case failed to comply with the terms of the notice issued under sub-section (4) of section 22, because he failed to produce this register which was the important document which he had. By a curiously tortuous form of argument it is suggested that this default on his part does not bring into operation section 23, sub-section (4), because it does not constitute a breach of sub-section (4) of section 22. For the purpose of that argument it is necessary to introduce into section 22 (4) an express or implied provision that a notice requiring an assessee to produce accounts and documents can only be served before he has made a return, and, if served after he has made a return, is illegal. To our minds this is a far-fetched suggestion, but as it has been accepted in one High Court in India and is relied upon in this case, it is necessary to examine it with some care. It is impossible to deny that the effect of such an interpretation is to make a great part of these sections unworkable, and the view seems to us completely out of touch with the realities of the question to be determined. There is nothing in sub-section (4) imposing any limitation upon the time when, or the conditions under which, the notice there mentioned is to be served. What possible object an Income-tax Officer can serve by sending a notice to an assessee to produce his accounts and documents before

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such assessee has made any return at all, it is difficult to follow. Why should the legislature have intended, without using express and clear language, to prevent the Income-tax Officer from calling upon an assessee to produce accounts and documents under this sub-section after he has made his return? The object of his doing so is made clear by the next section. If the Income-tax Officer is satisfied that a return is correct, he is directed to make the assessment under sub-section (1). How is he to be satisfied, if he has any suspicion or grounds for dissatisfaction, unless, when he sees the return and has some materials before him for forming a judgement, he can ask to see the books of the assessee? *A fortiori*, unless he is to obtain private information from secret and possibly unreliable sources, how is he to form a belief under section 23, sub-section (2), that the return made under section 22 is incorrect or incomplete, unless at least he can inform himself by the obvious and elementary method of calling for the books? It is to be observed that the notice which he may serve on the person who made the return under section 23 (2) is only to be served when the officer has reason to believe that the return made is incorrect or incomplete; and unless the return is, on the face of it, ridiculous or the Income-tax Officer has secret information, it is impossible for him to form any honest belief on the subject at all, unless he can secure some materials. It seems to us, therefore, that a great part of the duties of the Income-tax Officer would be rendered practically unworkable if it were to be held that sub-section (4) of section 22 could only be worked before a return had been made. The Government Advocate made a valuable criticism upon the argument. The machinery is slightly different where there is a company and where there is an individual assessee. In the case of a company, under sub-section (1), the principal officer is required to prepare and furnish every year on or before

the 15th day of June in each year a return, whereas the return under sub-section (2) required of an individual is only to be made in response to a notice served upon him by the Income-tax Officer to make such return within a specified period. It follows, therefore, that if the argument put forward were to be accepted, the words "before the 15th June in each year" would have to be inserted in the case of the principal officer of any company in sub-section (4) of section 22, and that, although there is not a word in the Statute to suggest it, if the Income-tax Officer did not call upon every company in his jurisdiction before the 15th of June to produce accounts and documents required by him—a most burdensome requisition—he would, after such company had made its return, be prevented for the rest of that fiscal year from doing so.

On this matter we have no hesitation in quoting from the excellent Commentary of Mr. Vishvanatha Sastri, a Vakil of Madras, the author of The Law and Practice of Income-tax, published in 1922, dealing with this very question of the evidence in support of a return under section 22. He expresses this opinion:—

"The Income-tax Officer is empowered to call upon the assessee (whether or not he has made a return) to produce such documents and accounts as he may require, within the period specified in the notice requiring their production. Sub-section (4) prevents the Income-tax Officer from calling upon an assessee to produce books of account going back for a period of more than three years prior to the accounting period. There is, however, no such limitation upon the power to call for documents. In the case of trades and business, the Income-tax Officers require, in addition to the profit and loss account, a copy of the balance-sheet. Provided the return which has been made is a correct one, the submission of these documents cannot prove detrimental to the tax-payer".

We agree with that opinion. The matter seems to us to be simple, and really it would seem almost unarguable, if it were not for the decision arrived at by the Patna

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High Court set out in Appendix (C) to the case.* We respectfully differ from that decision and find it somewhat difficult to follow. The fallacy, if we may say so, is based upon the assumption which, in our view, there is nothing to justify, that a notice under section 22 (4) can only be given to a person who has not made a return, and that if it is given after a return has been filed, such a notice is illegal. One of the reasons given in the judgement is that the words, "having made a return", which occur in the third case of default in section 23 (4), create some antithesis between such default and the preceding default of failing to comply with a notice under section 22 (4). We cannot follow this. It is not a case where any antithesis is required. To our minds the words merely mean what they say, and have no other object than that which the Government Advocate pointed out, of emphasizing the fact that the third default, namely, failure to comply with sub-section (2) of section 23, can only be made by a person who has already made a return, because it is only such a person who can be served with a notice in accordance with sub-section (2) of section 23. It is wrong to say that they are meaningless. Many reasons might be given why the draftsman thought it right to insert them where they are. One reason is this, that an Income-tax Officer may have honest reason to believe that the return which he has received has been made by the assessee and is incorrect or incomplete, when the return was not in fact made by the assessee at all, and although the Income-tax Officer might have honest reason to believe that it was, and might legitimately serve on such person a notice under sub-section (2) of section 23, such person would have a complete answer to an assessment against him to the best of the Income-tax Officer's judgement under sub-section (4) by

*Vide *Brijraj Ranglal* v. *Commissioner of Income-tax*, (1927) A.I.R., (Pat.), 390.

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proving that he had not made the return. No doubt this illustration is an extravagant one in the sense that it is unlikely to occur, but in a country in which false documents are so common and false charges are so frequently made out of enmity, it may well have been considered quite possible that a discharged servant or some other enemy might deliberately send in a false return purporting to be by an assessee, which would appear to be incomplete or incorrect on the face of it, for the purpose of inducing the Income-tax Officer to give him what is called in this country "Dik". At any rate, if such a case should occur, the language which we have just cited is appropriate thereto. We, therefore, answer the first part of the question in the affirmative and the second in the negative, agreeing with the Commissioner. The assessee must pay the costs. We fix the fee at Rs. 150.

REVISIONAL CRIMINAL.

Before Justice Sir Cecil Walsh and Mr. Justice Banerji.

EMPEROR *v.* KISHAN NARAIN.*

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January, 6.

Criminal Procedure Code, section 107—Security for keeping the peace—Order passed on the admission of the accused that he is willing to give security.

Where a person against whom a notice is issued under section 107 of the Code of Civil Procedure consents to give security, there is no reason why the Magistrate concerned should not proceed to pass orders against him without further inquiry, provided that the Magistrate is satisfied that such person fully understood the meaning of the notice and that he was at liberty to show cause against it if he wished to do so. *Emperor* v. *Ghariba* (1), followed. *Palaniappa Asary* v. *Emperor* (2) and *Jagdat Tewari* v. *Emperor* (3), referred to.

*Criminal Revision No. 775 of 1927, by the Local Government, from an order of Shambhu Nath Dube, Sessions Judge of Bareilly, dated the 8th of September, 1927.

(1) (1923) I.L.R., 46 All., 109. (2) (1910) I.L.R., 34 Mad., 139.
(3) (1920) 54 Indian Cases, 784.

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THIS was an application in revision preferred on behalf of the Local Government against an order of the Sessions Judge of Bareilly reversing an order of a Magistrate whereby he had directed one Kishan Narain to give security for keeping the peace, the order being based on the accused's own admission. The facts of the case appear from the judgement of the Court.

The Government Advocate (Pandit *Uma Shankar Bajpai*), for the Crown.

Babu *Surendra Nath Gupta*, for the opposite party.

WALSH and BANERJI, JJ. :—This is a Government revision questioning the view which was taken by the Sessions Judge on an appeal from an order made by a Magistrate under section 117, calling upon the party summoned to give security to keep the peace. The matter has been brought before us with the view of settling a point, which is undoubtedly of importance and on which there have been in the past some differences of judicial opinion. It is merely a question of procedure. The facts are that on the 26th of May, the Magistrate received a report from a Sub-Inspector stating that there had been old enmity between one person and the present party and that the enmity was continuing, that the two persons who were concerned in the dispute were preparing to make false charges against one another, that there was an apprehension that there would be a breach of the peace and, more than that, of the commission of a serious offence. Everybody knows the tendency of parties, when they get into this acute condition of quarrel, to take the law into their own hands, and to commit some unfortunate act of violence for which everybody afterwards is sorry, and it was prayed by the Sub-Inspector that proceedings should be taken against both the parties under section 107. The Magistrate thereupon issued a notice to the present party under section

107, dated the 13th of June. No complaint is made of the notice. It set out in substance the fact of the dispute as being the reason for the issue of the notice, and it called upon the present party to appear in court on the 27th of June to show cause why he should not be bound over and execute bonds of the amount of Rs. 200. On the 27th of June, the party appeared. Now, in an ordinary criminal case, to which possibly a charge of murder is the only exception, it is open to an accused person to plead guilty, and it is open to a court to accept and to act upon that plea. It would be contrary to common sense and to the universal practice if a court were not to act upon that plea, and nobody contends that a court is compelled after a plea of guilty, which it is willing to accept, to waste public time by insisting on a quantity of evidence being called, as though a charge had to be proved and a defence had to be heard. We can find nothing in the Statute, independently of any authorities which have been decided by way of interpretation of it, which prevents a court acting in that manner in a summons case. As the Government Advocate pointed out, the procedure prescribed in these cases under section 107 is the procedure prescribed for conducting trials and recording evidence in summons cases. The Magistrate is directed expressly by section 117 to proceed to inquire into the truth of the information upon which action has been taken, and to take such further evidence as may appear necessary. One method of inquiring into the truth of the information is to draw the attention of the person concerned to the matters contained in the notice and to ask him whether he has any cause to show or whether he desires further inquiry, or whether he disputes the allegations, or whether he is willing to be bound over on the strength of such allegations, and it would be a far-fetched and unreasonable interpretation to hold that a Magistrate asking such questions

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and inviting the person summoned to state to the court his attitude with regard to the summons was not taking reasonable steps to inquire into the truth of the information. The direction in the section further calls upon him to take such further evidence as may appear necessary. Courts are bound to give a reasonable interpretation to language of this kind. The language puts upon the Magistrate the duty of making up his mind whether further evidence is necessary or not. It is unreasonable to say that he has a statutory duty to take further evidence, if he does not consider it necessary, and it is equally unreasonable to hold that he is wrong in considering further evidence unnecessary, if the Magistrate has made the person summoned understand what the inquiry is about and has given him an opportunity of showing cause, if he wants to, and on the other hand, has accepted his consent to be bound over as an intimation that he has no complaint to make of the information on which the Magistrate has proceeded. Looking at the matter independently of authorities, we are of opinion that all that is necessary to protect the interests of members of the public, who may be summoned, is to make it clear that the Magistrate must be satisfied that the person summoned understands the proceedings, and that he is at liberty to show any cause if he wishes to do so. In this case it is clear that the Magistrate took every proper precaution and that the cultivator who was summoned understood what he was doing and saying. As a matter of fact, the only reason for his presence in court was to meet this single matter. It was unobscured by any side issue or by the presence of any other person, whose attitude with regard to the question at issue might be different. Having the contents of the notice before him, based upon the information of the Sub-Inspector, which he was at liberty to consider or dispute, he was asked whether he had any objection to

execute a bond in accordance with the notice for keeping the peace for one year. No man in his sound senses could possibly misunderstand that invitation. The party's answer shows that he fully understood it. He said, "I have no surety", meaning no independent person other than himself, which is what the notice and the question required him to produce, and he asked that a bond by himself only should be accepted. but that the amount of it should be reduced. The Magistrate thereupon recorded an order that the accused agreed to be bound down, which is inconsistent with anything but an acknowledgement that the information which was the root of the proceedings was correct, and he went on to accept the offer of the party summoned to give one personal bond in a reduced amount. The result was that no order was made against him for the provision of an independent surety and that his own personal bond in the reduced sum of Rs. 50 was ordered. Nobody can doubt, under such circumstances, that the party fully understood what he was doing, and that the court took a reasonable view of the matter and really accepted the offer of the party himself. What possible objection, statutory or in common sense, can seriously be made to such a proceeding, it is difficult to understand. The cases which have been decided in the past appear to us on the whole to contain *dicta* which go rather father than is justified by anything in the Statute, but they are not in all instances on all fours with the present case. The decision in Madras, *Palaniappa Asary* v. *Emperor* (1), was passed upon a proceeding from which it was not clear that the person summoned was agreeing to give security against a possible breach of the peace. All he was asked was whether he was willing to execute bonds or whether he desired further inquiry—a somewhat vague invitation—which may have justified the decision in that particular case. In a

(1) (1910) I.L.R., 34 Mad., 139.

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more recent case, decided by a member of this Bench, the facts were somewhat different from the case now before us. That was a case under section 110, in which the procedure is somewhat different, although we are not prepared to say that the principles applicable are necessarily different, but there the Magistrate had taken evidence, and after the evidence three of the persons summoned had expressed their willingness to produce security for good behaviour and had tendered no evidence, and the Sessions Judge in appeal, not unreasonably, held that as regards those three persons, as they had expressed their willingness after evidence had been taken, there was nothing to consider in the appeal. The learned Judge in that case went, as it seems to us, rather far in holding that an appellate court could not act upon the admission of the persons summoned, although they had made such admission after the evidence had been called against them and they had had every opportunity of calling evidence, if they wished, on their own behalf. But he based himself on reported decisions by single Judges in cases under section 107, holding that there was no distinction in principle between the two classes of cases. There are two cases in which a member of this Bench dealt with the matter in each case on a different footing. Both were cases under section 107. The first, *Jagdat Tewari* v. *Emperor* (1), appears to decide that there ought to be some evidence on the record, and that if a Magistrate is going to act upon a consent, he should obtain a full admission from each person called upon that he is likely to commit a breach of the peace and an admission of the reasons why he is likely so to do. The judgement goes on to say that an admission of that kind clearly made by a person who is to show cause, becomes evidence in the case. The somewhat burdensome duty imposed upon the Magistrate by the *dicta*

(1) (1920) 54 Indion Cases, 784.

contained in that judgement may possibly be explained by the fact that there were several persons summoned and that a general admission by all the persons summoned may be misleading, and that where there are several persons against whom obviously the information must involve different sets of allegation, it is better, in their own protection, that each should be required to state precisely his own position and should not be, so to speak, swept into the net by a general admission of willingness to give security. But the same Judge in a later case saw reason to consider that the *dicta* in that case had gone too far. In *Emperor* v. *Ghariba* (1) he said that he was inclined to think that he had gone too far in holding that there must be some evidence upon the record beyond a full consent given by the person summoned. In the case which he was then deciding it appeared that each of the persons had had the notice read out to him and in answer to the notice expressed his willingness to execute a bond to keep the peace, and the Judge deciding that case went on to say that that itself was evidence upon which a Magistrate could act. It was really a plea of guilty, assuming that the person summoned understood what he was doing, and that in such cases the person summoned might waive the formal production of evidence. That case seems to us on all fours with the present case and we agree with what was there held, that under section 107 a court is entitled to act upon a solemn and free consent amounting to a plea of guilty given before it by the person summoned. It is not without importance to observe that in taking the view which we take in this case, we do not think that we are departing from any established practice of the court. The judgement in the case last referred to mentions that the learned Judge, before deciding the matter, consulted with Mr. Justice RYVES and with another Judge of the

(1) (1923) I.L.R., 46 All., 109.

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Court and that they both agreed with the view which he took. We think that the Sessions Judge in this case went too far, that he really had no right to entertain the point in appeal and that the revision must be accepted and the order of the Magistrate restored.

Revision accepted.

Magistrate's order restored.

REVISIONAL CIVIL.

Before Mr. Justice Dalal.

1928

January, 10

GANGADHAR (DEFENDANT) *v.* KANHAI (PLAINTIFF).*

Act No. V of 1920 *(Provincial Insolvency Act), sections* 41, 44 *and* 34*—Insolvency—Surety—Effect of order of discharge on the claim of a person who had gone surety for the insolvent and had been compelled to pay.*

K was surety for the payment of a debt due by G to D. G applied to be declared insolvent and in due course G was discharged. D then sued K and got a decree against him. Thereafter K sued G for recovery of the amount which he had been compelled to pay.

Held that the order of discharge was a bar to the suit. *In re Blackpool Motor Car Company, Ltd.* (1), followed.

THIS was an application in revision against a decree of the Court of Small Causes at Jhansi. The facts of the case sufficiently appear from the judgement of the Court.

Pandit *K. N. Laghate*, for the applicant.

Dr. *N. C. Vaish*, for the opposite party.

DALAL, J.—In my opinion the Court of Small Causes has gone wrong on a point of law and this Court

*Civil Revision No. 195 of 1927.

(1) (1901) 1 Ch., 77.

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must interfere. The plaintiff was surety of the defendant Gangadhar with respect to a particular debt. Gangadhar applied for an order of adjudication, subsequent to the debt being contracted and the plaintiff becoming a surety for the payment of that debt. Such an order was passed and subsequently he was discharged under section 41 of the Provincial Insolvency Act. Subsequent to the discharge, the creditor Daru sued the surety Kanhai and recovered his debt from him. Kanhai was bound to make payment, because under section 44 (3) an order of discharge does not release any person who was surety for the person discharged. On making payment to Daru, Kanhai brought a suit against Gangadhar for recovery of the amount paid by him to Daru. The question then arises whether Kanhai's debt was provable under the Provincial Insolvency Act or not. It is laid down in clause (2) of section 44 that an order of discharge shall release the insolvent from all debts provable under this Act. Section 34 lays down what debts are provable and what not. The only debts which may be excluded from the schedule are those which have been declared by the court to be incapable of being fairly estimated, and demands in the nature of unliquidated damages. The debt of a surety does not come under either head; it is not alleged here that Kanhai's debt was declared by the court to be incapable of being fairly estimated. There is a very wide scope given to debts and liabilities provable under the Act in clause (2) of section 34. They include debts and liabilities, present or future, certain or contingent. On behalf of the applicant Mr. *Laghate* referred to English rulings which leave no doubt that a surety has a right of proof in respect of contingent liability as surety: *In re Blackpool Motor Car Company, Ltd.* (1). The defendant

(1) (1901) 1 Ch., 77.

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Gangadhar was therefore released from the debt due to the plaintiff.

I set aside the decree of the lower court and dismiss the plaintiff's suit with costs of all the courts.

Decree set aside.

MISCELLANEOUS CIVIL.

Before Mr. Justice Sulaiman and Mr. Justice Kendall.

1928

January, 13.

DEOKI AND OTHERS (PETITIONERS) *v.* JWALA PRASAD (OPPOSITE PARTY.)*

Civil Procedure Code, order XXIII, rule 1—*Order permitting withdrawal of appeal—Application for amendment of decree.*

When an appellate court does not judicially deal with the matter of a suit but merely permits an appeal to be withdrawn, so that the decree of the court below is left intact, it cannot be said that it has confirmed the decision appealed from. It is not, therefore, possible for such court to entertain an application for amendment of the decree. *Abdul Majid* v. *Jawahir Lal* (1), *Nand Lal Saran* v. *Dharam Kirti Saran* (2) and *Pitam Lal* v. *Balwant Singh* (3), followed.

THE facts of this case sufficiently appear from the judgement of the Court.

Munshi *Panna Lal*, for the applicants.

Dr. *Kailas Nath Katju*, for the opposite party.

SULAIMAN and KENDALL, JJ. :—This is an application for an amendment of our decree. It appears that in a partition suit the claim was decreed and in its judgement the court below directed that mesne profits should be ascertained in the execution department. This direction was not incorporated in the decree which was prepared by the court below. The defendants appealed

*Miscellaneous Case No. 1028 of 1927.

(1) (1904) I.L.R., 36 All., 350. (2) (1926) I.L.R., 48 All., 377.
(3) (1925) 23 A.L.J., 518.

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to the High Court but the plaintiffs did not file any cross-objection. On the date when the appeal came up for hearing the defendants withdrew their appeal without liberty to institute a fresh appeal. They were made to pay the costs of the opposite party. An oral request was made at that time for the amendment of the decree of the court below, which we declined to entertain at that stage.

In our opinion when the appeal was withdrawn the order which we passed on that occasion granting permission to withdraw the appeal under order XXIII, rule 1, was not a decree so as to supersede the decree of the court below. When an appellate court does not judicially deal with the matter of a suit but merely permits an appeal to be withdrawn, so that the decree of the court below is left intact, it cannot be said that it has confirmed the decision appealed from. It merely recognizes authoritatively that the appellant does not wish to go on with his appeal. We may refer to the case of *Abdul Majid* v. *Jawahir Lal* (1), where their Lordships of the Privy Council laid down this proposition with regard to an appeal which had been dismissed for want of prosecution. This case was followed in *Nand Lal Saran* v. *Dharam Kirti Saran* (2) where the appellate court had held that no appeal in fact lay to that court. There is another case of this Court, viz. *Pitam Lal* v. *Balwant Singh* (3), to the same effect. We are of opinion that that principle applies to an equal extent to the case where the appeal is withdrawn. We cannot therefore amend the decree of the court below.

The result therefore is that this application must be dismissed with costs.

Application dismissed.

(1) (190) I.L.R., 36 All., 350. (2) (1926) I.L.R., 48 All., 377.
(3) (1925) 23 A.L.J., 518.

Before Mr. Justice Ashworth.

1928 TULA RAM (PLAINTIFF) v. DWARKA DAS AND ANOTHER (DEFENDANTS.)*

January, 16.

Act No. VII of 1870 *(Court Fees Act), section* 7, *clause* (iv) (c)—*Act No. VII of* 1887 *(Suits Valuation Act), section* 8—*Court fee—Suit for a declaration of plaintiff's title and for possession.*

If a plaintiff elects to ask in his plaint for a declaration of his title as well as for possession of certain property, when he need only have sued for possession *simpliciter*, he will have to pay court fees as on a suit for a declaration with consequential relief, unless the court allows him to amend his plaint by striking out the prayer for a declaration. So *held*, where the plaintiff had prayed (*a*) for a declaration that a mortgage executed by his co-parcener and a decree for foreclosure obtained thereon were void and ineffectual, and (*b*) for possession. *Ganga Dei* v. *Sukhdeo Prasad* (1), followed. *Tika Ram* v. *Salig Ram* (2), dissented from.

ON a first appeal being filed in the High Court, the Stamp Reporter made the following report :—

"This appeal arises out of a suit brought by the plaintiff appellant for the following reliefs :—

(*a*) It may be declared that the mortgage-deed, dated the 15th of September, 1913, executed by Roshan Lal, in favour of Dwarka Das, and decree No. 117 of 1915, *Dwarka Das* v. *Musammat Kausilia*, dated the 4th of January, 1916, and final decree No. 265 of 1916, dated the 27th of November, 1916, are void, ineffectual, fraudulent and collusive and have been obtained in order to prejudice the right of the plaintiff.

(*b*) Possession over the property detailed below may be awarded to the plaintiff. If in the opinion of the court any condition or restriction may be considered

*Stamp Reference in First Appeal No. 322 of 1925.

(1) (1924) I.L.R., 47 All., 78. (2) (1920) 57 Indian Cases, 494.

to be proper, possession may be awarded with those conditions and restrictions.

(*c*) Costs of this suit may be awarded.

(*d*) Any other relief which may under the circumstances of the case be beneficial to the plaintiff may also be granted.

The valuation of the suit for purposes of jurisdiction was laid at Rs. 6,000 and a court fee of Rs. 53-10 was paid, *viz.* Rs. 30 for declaration and Rs. 23-10-0 for possession.

The suit, being for declaration and possession, clearly falls within the purview of section 7, cl. (iv) (*c*) of the Court Fees Act, read with section 8 of the Suits Valuation Act, and is liable to be charged with an *ad valorem* court fee, which comes to Rs. 315.

The nature of the claim is such as would render the suit to be one in which the declaration with a consequential relief is prayed, because unless the declaration prayed for is granted the possession asked for cannot be granted, because the properties are in the possession of the decree-holder who has purchased them. Rs. 53-8 having already been paid, there is a deficiency of Rs. 261-8 payable by the plaintiff appellant for the court below.

The suit having been dismissed, the plaintiff appellant has filed this appeal, valuing it at Rs. 6,000 and paying the same amount of Rs. 53-8 as court fee, as was paid in the court below. For the reasons stated above there is also a deficiency of Rs. 261-8 payable by the plaintiff appellant for this Court."

This report being disputed by the appellant, the Taxing Officer referred the case to the Taxing Judge, who passed the following order :—

ASHWORTH, J. :—This is a reference by the Taxing Officer for a decision as to the proper court fee to

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be paid in a suit out of which has arisen F. A. No. 322 of 1925. According to the plaint the plaintiff and his nephew were co-parceners in respect of certain property. On the 15th of September, 1913, the nephew, Roshan Lal, executed a usufructuary mortgage in favour of defendant No. 1. On the death of Roshan Lal, some eight or nine months later, the mortgagee brought a suit for foreclosure against Musammat Kausilia, widow of Roshan Lal, and got a decree. The plaintiff asks for a declaration that the mortgage-deed was void and ineffectual, as Roshan Lal had no right to transfer the family property. There is no statement in the plaint whether Roshan Lal was the manager or not of the family. The second relief claimed was possession of the property.

Now in a suit for possession it is not necessary for the plaintiff to sue for a declaration as to his title. At any rate, in a suit of this nature for possession, it is not necessary for him to do so. The plaintiff's counsel consequently maintains that the court fee should be valued merely as in a suit for possession. In support of this contention he invokes a Full Bench decision of the Patna High Court, *Ram Sumran Prasad* v. *Gobind Das* (1). That decision is not, in my opinion, applicable to the present case. In that case, although the plaintiff asked for an adjudication upon his title, he did not include amongst the reliefs claimed a prayer for a declaration as to his legal character or title or as to the invalidity of a certain transfer. Next I am referred to a single Judge decision of this Court, *Tika Ram* v. *Salig Ram* (2). In that case the plaintiff did ask for a declaration as one of the reliefs which he claimed. It was held by Mr. Justice TUDBALL that as it was unnecessary for the plaintiff to ask for a declaration, the suit should have been treated as an or-

(1) (1922) I.L.R., 2 Pat., 125.
(2) (1920) 57 Indian Cases, 494.

dinary suit for possession of property. The learned Judge invoked the fact that "suits of this nature are very common and they have always been treated as ordinary suits for possession of property and court fee is paid on five times the Government revenue". On the other hand I have been referred to a single Judge decision of this Court, *Ganga Dei* v. *Sukhdeo Prasad* (1). In that case DANIELS, J., stated as follows:—

"Now the suit as framed is clearly one for a declaration with consequential relief. It is, therefore, beside the mark to suggest that the suit might have been framed so as to ask for different reliefs, or, in other words, that it might have been framed purely as a suit for possession. The plaintiff has to pay court fee on the relief which she seeks to obtain by the suit".

I entirely concur with the decision of Justice DANIELS in *Ganga Dei* v. *Sukhdeo Prasad* (1) and dissent from the contrary view taken by TUDBALL, J., in *Tika Ram* v. *Salig Ram* (2). At the time when a plaint is filed, it is impossible for a court or an officer of the court to go into the question whether the plaint unnecessarily asks for a declaration with the consequential relief of possession or whether it would have served the purpose of the plaintiff to ask merely for possession. When the plaintiff asks for a declaration as his first relief and possession as a second relief, it must be taken that in the opinion of the plaintiff, or at least of his legal adviser, the declaration is a necessary relief. If the argument invoked by TUDBALL, J., were pressed to its logical conclusion, we should return the court fee to any litigant who could prove that he had brought an unnecessary suit. As regards TUDBALL, J.'s invocation of the practice of this Court, I am of the opinion that practice cannot override the language of a statute. There is no necessity of giving effect to a

(1) (1924) I.L.R., 47 All., 78. (2) (1920) 57 Indian Cases, 494.

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wrong view merely because that wrong view has not been challenged for a long time, that is to say, where the question is the construction to be put upon a certain enactment.

I hold that the test in such cases invariably should be whether the plaintiff includes amongst the reliefs claimed not only a request for possession but also, as paving the way to such request, the relief of a declaration of title. This view derives support from a consideration of what would happen in a reverse case where the plaintiff fails to ask for a declaratory relief but is found not to be entitled to possession without first obtaining a declaration. In such a case the plaintiff would be required to amend his plaint and to pay the extra court fee. Similarly in a case such as this case is, it is clear that the plaintiff can only be excused from the court fee if he gets the permission of the court to amend the plaint and strike out the relief for a declaration.

For the above reasons my answer to the Taxing Officer is that the view taken by the office is correct, and that the deficiency reported should be made good. The Taxing Officer may allow such time as he thinks fit for the payment of the deficiency. As counsel for the plaintiff appellant did not appear, this order is delivered *ex parte*.

APPELLATE CIVIL.

Before Sir Grimwood Mears, Chief Justice, and Mr. Justice Mukerji.

JAI NARAIN RAI AND ANOTHER (PLAINTIFFS) *v.* BAIJNATH RAI AND OTHERS (DEFENDANTS.)* 1928 *January*, 18.

Hindu law—Joint family—Partition—Facts necessary to constitute separation—Intention of members.

Separation is the result of intention among the members of a joint Hindu family. That separation can be effected either by deed or by acts or both by deed and acts. If the deed be unequivocal in its language and the intention of the parties is clear from it, it would not be necessary to prove acts in support of the deed. *Balkishen Das* v. *Ram Narain Sahu* (1), and *Palani Ammal v. Muthuvenkatachala Moniagar* (2), referred to.

THE facts of this case sufficiently appear from the judgement of the Court.

Dr. *Surendra Nath Sen* and Pandit *Uma Shankar Bajpai*, for the appellants.

Dr. *M. L. Agarwala*, Dr. *Kailas Nath Katju* and Babu *Indu Bhushan Banerji*, for the respondents.

MEARS, C. J., and MUKERJI, J. :—The appellants in this appeal were the plaintiffs in the court below. The pedigree at page 11 of the printed record will show that the sons of Baldeo Rai are the plaintiffs. The son of Akalu Rai, who is a descendant of Tirlok Rai, the plaintiffs' paternal uncle, is the defendant first party. The defendants second party are two ladies. One Musammat Bartana Kunwar, who has at some places been

*First Appeal No. 53 of 1925, from a decree of Raj Behari Lal, Subordinate Judge of Ghazipur, dated the 22nd of December, 1924.

(1) (1903) I.L.R., 30 Calc., 738. (2) (1924) I.L.R., 48 Mad., 254.

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described as Musammat Birta Kunwar, is the widow of Nakchhedi Rai, who represented the first branch of Fateh Narain Rai's descendants. Musammat Sheodasi, the second defendant in the second party, is the widow of Deo Narain Rai who was a brother of Akalu Rai.

The plaintiffs' case was that they and the defendant No. 1 formed a joint Hindu family and the defendants second party were ladies of the joint family and as such had no interest in the joint family property. According to the custom of the country and for the consolation of their own, the names of the ladies were entered in the revenue papers. Some people who wanted a disruption in the family persuaded the ladies to apply for partition of shares that stood recorded in their names. The plaintiffs objected to the partition and thereupon the revenue court, on the 10th of June, 1924, directed the plaintiffs to obtain a declaration of their title by institution of a suit within the statutory period. The plaintiffs accordingly sued to obtain a declaration that they and the defendant No. 1 were the owners of the property recorded in the defendants' names and that the defendants had no interest whatsoever in the property.

The defendant No. 1 did not contest the suit. The defendants Nos. 2 and 3 filed separate written statements. Their case was that the family was separate, that Girja Prasad Rai, the son of Sheodasi, and Nakchhedi, the husband of Musammat Bartana Kunwar, died as separated Hindus and that the ladies were rightfully in possession as heirs to the deceased members aforesaid. They relied on a certain document dated the 12th of April, 1919, and added that after that document had been executed an actual partition by metes and bounds and division of movable property followed.

The learned Subordinate Judge who heard the case held that the deed of the 12th of April, 1919, effected

a separation in the family, though there was no sufficient evidence to prove that any actual division by metes and bounds or any actual division of movable properties followed the execution of the deed. He accordingly dismissed the suit. On behalf of the plaintiffs it has been contended that the learned Judge was wrong in his interpretation of the document of the 12th of April, 1919, and that that document did not create a change in the status of the family. It was urged that something more than the mere execution of a document would be necessary for the purpose of creating a change in the status of jointness.

It has been conceded and is well established that separation is the result of intention among the members of a joint Hindu family. That separation can be effected either by deed or by acts or both by deed and acts. If the deed be unequivocal in its language and the intention of the parties is clear from it, it would not be necessary to prove acts in support of the deed. This was held in the case of *Balkishen Das* v. *Ram Narain Sahu* (1). The following occurs in the headnote :—

"They might elect either to have a partition of their shares by metes and bounds or to continue to live together and enjoy their property in common as before. Whether they did one or the other would affect the mode of enjoyment, but not the tenure of the property or their interest in it, which was, on the principle of the case of *Appovier* v. *Rama Subba Aiyar*, determined by the allotment to them of defined shares by the *ikrarnama*.

The legal effect of the *ikrarnama* could not be controlled or altered by evidence of the subsequent conduct of the parties; but such conduct in this case was not inconsistent with an intention to subject the whole property to a division of interest, although it was not immediately to be perfected by an actual partition".

(1) (1903) I.L.R., 30 Calc., 738.

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On behalf of the appellants the learned counsel quoted the case of *Palani Ammal* v. *Muthuvenkatachala Moniagar* (1). At page 257 occurs the following passage :—

"But the mere fact that the shares of the co-parceners have been ascertained does not by itself necessarily lead to an inference that the family had separated."

As already stated, the whole matter is one of intention and the question is whether in any particular case there is sufficiently good evidence afforded either by document or by the conduct of the parties or by both to prove the intention. In the passage from the case of *Palani Ammal*, quoted above on behalf of the appellants, it is not said that a deed alone will not be sufficient to effect a partition in the family. All that the sentence means is that there may be an ascertainment of shares without necessarily leading to an inference that the members of the family, the executants of the document, wanted to separate.

Thus clearing the law on the point, which indeed is well settled, we proceed to examine the document of the 12th of April, 1919. It will be found printed at page 29 of the record. The parties to this document are Nakchhedi Rai representing one branch of Fateh Narain Rai's family, as the first party, Jai Narayan Rai for himself and as the guardian of his younger brother Shyam Narayan Rai, representing one of the two branches of the second branch of Fateh Narain Rai's descendants, and Akalu Rai for himself and Girja Prasad Rai, as representing the other half of the second branch. The mother of Girja Prasad is also a party. The executants proceed to recite that they had been living jointly up to the date of the execution of the document and expressed the intention to continue to do so, as long as no hostility arose among themselves. Then, Nakchhedi

(1) (1924) I.L.R., 48 Mad., 254.

Rai states, in unambiguous language, that he the first party was entitled to and was *in proprietary possession of* a moiety share in all the zamindari property and cultivatory holdings. Then the defendants second and third parties recited that they were each entitled to and were in *proprietary possession of* a fourth share. Then the parties agree that, on foot of that document, it would be open to any of the parties to ask for mutation of names in accordance with the shares declared by the document. Lastly, the executants declare that the debts that may be owing by the family, would be paid by each of the different parties in proportion to his or their respective shares. The question is whether this document, taken by itself, was or was not a clear declaration of the intention of the parties to make a change in their status of jointness. We are clearly of opinion that the document did declare such an intention without doubt.

A small amount of documentary evidence has been adduced on behalf of the plaintiffs appellants to prove that in spite of the document of the 12th of April, 1919, the parties continued to conduct themselves as if they were members of a joint Hindu family. The first document given in evidence is a sale-deed executed by one Lachhmi in favour of Nakchhedi Rai, Jai Narain Rai and Akalu Rai, dated the 21st of May, 1919. It will be noticed that the heads of each of the three branches of the family figure as the purchasers. It is true that there is no definement of the shares purchased, but it cannot be contended for a moment that the three purchasers were purchasing in equal shares. For, even if the purchase had been made by a joint Hindu family, the shares would have been the same as were declared by the document of the 12th of April, 1919, which were the legitimate shares of the purchasers. Then three rent receipts were read out to us. They only prove that Nakchhedi Rai realized certain rents. The tenants

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have not been examined to prove whether they paid the entire rent to Nakchhedi Rai or only his proportionate share. Then a judgement of the Munsif of Muhammadabad, dated the 28th of February, 1922, was read. It appears that certain plaintiffs, who had purchased a 2/3rd share in a property mortgaged to the family of the present parties, sought redemption of the entire property on the ground that they were owners of a portion of the property. In the written statement that was filed by Nakchhedi Rai he distinctly stated that 1/3rd of the property had been purchased by Akalu Rai and he alone was in possession of the same. When, however, the case came to trial, the learned counsel for the defendants stated that Akalu Rai's purchase was on behalf of the entire family. The motive of this statement was that if the purchase was not by one of the several mortgagees, but by all the mortgagees in a body, the plaintiffs would have no right to redeem more than the share owned by them. On making this statement they succeeded in the defence and the plaintiffs were prevented from redeeming more than their 2/3rd share. The statement of the counsel, in view of the verified written statement of Nakchhedi Rai, does not afford any such evidence of the conduct of the members of the family as may contradict a case of a separation effected on the 12th of April, 1919. On the other hand, the statement of Nakchhedi Rai establishes that it was recognized by him that the family had separated by the document of the 12th of April, 1919.

On consideration of the entire evidence put before us, we are of opinion that the document of the 12th of April, 1919, was intended to create and did in law create a separation in the family and that the plaintiffs' suit was properly dismissed. We dismiss the appeal with costs.

Appeal dismissed.

REVISIONAL CIVIL.

Before Mr. Justice Dalal.

MOHAN SINGH AND OTHERS (DECREE-HOLDERS) *v.* JAGAT SINGH AND ANOTHER (OBJECTORS.)* 1928 *January*, 18.

Act No. IX of 1908 (*Indian Limitation Act*), *schedule* 1, *article* 182—*Execution of decree—Limitation—Application for substitution of names—"Step in aid of execution"—Civil Procedure Code, order XXI, rule* 16; *order XXII, rule* 1.

An application for substitution of names is a step in aid of execution. *Pitam Singh* v. *Tota Singh* (1), followed. *Annamalai Mudaliar* v. *Ramier* (2), referred to.

Rule 16 of order XXI applies only to substitution along with execution and there is no bar under any of the rules in schedule I of the Code of Civil Procedure to substitution of names by an executing court when an execution proceeding is already pending.

THE facts of this case are fully set forth in the judgement of the Court.

Pandit *K. N. Laghate* and Munshi *Girdhari Lal Agarwala*, for the applicants.

Mr. *G. K. Shinde*, for the opposite parties.

DALAL, J. :—The question to be decided here is whether limitation of an application for execution filed in the Court of Small Causes on the 13th of February, 1925, was saved or not by action taken by the decree-holder in earlier years. That court passed the money decree on the 2nd of June, 1920. The first execution application was presented by the original decree-holder on the 16th of November, 1921, and the application was transferred to the court of the regular Munsif of Fatehabad on the 17th of November, 1921. During the pendency of proceedings in the Fatehabad court the decree-holder died and his successors in interest, Durga Prasad and others, applied to that court on the

*Civil Revision No. 204 of 1927.

(1) (1907) I.L.R., 29 All., 301. (2) (1908) I.L.R., 31 Mad., 234.

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18th of February, 1922, for substitution of their names in place of that of the original decree-holder and for continuation of execution proceedings. They deposited process-fee for service of notices on the judgement-debtors on the 21st of March, 1922, and notices were issued. On the 16th of April, 1922, the Fatehabad court directed substitution of names and amended the application. The proceedings in execution were stayed because a connected original suit was pending, and finally on the 19th of February, 1924, the Fatehabad court rejected the application. The next application was filed in the Court of Small Causes on the 13th of February, 1925, and was dismissed in default on the 6th of April, 1925. Subsequent to this date the decree was sold to persons who are applicants in revision here and they applied for substitution and execution under order XXI, rule 16, on the 15th of December, 1926. This application was dismissed. The court conceded that it was within time from the next preceding application of the 13th of February, 1925, but it was of opinion that the application of Durga Prasad and others of the 18th of February, 1922, did not save limitation as it was not made in the proper form of 18 columns to the proper Court of Small Causes, but was wrongly made merely for substitution and to the court at Fatehabad, where the application was transferred for execution. When that application was removed, the decree-holder would have to refer back to the 16th of November, 1921, when the first application for execution was made by the original decree-holder, and that was obviously of no benefit to the applicants, because it was filed more than 3 years prior to the 13th of February, 1925.

The applicants have come here on the ground that the Court of Small Causes refused to exercise jurisdiction which was vested in it of executing the decree. I think the point was correctly argued by Mr. *Laghate*

that the court overlooked the consideration of the question whether the application of the 18th of February, 1922, was or was not some step in aid of execution of the decree. The subordinate court refused the benefit of the application of the 18th of February, 1922, on the ground that the application was not made in accordance with law to the proper court of execution, but did not consider whether it was a step in aid of execution or not. The two matters are distinct under paragraph 5 of article 182 and not concurrent. Mr. *Shinde* on behalf of the respondents relied on the defects in the application not being one for execution and to the proper court, as directed by order XXI, rule 16, and urged that those defects prevented the application from being one that could be treated as a step in aid of execution. It may be observed that the limitations are of an application being in accordance with law and to the proper court where a step in aid of execution is put forward to save limitation. First of all I am not prepared to hold that the Fatehabad court had no jurisdiction to substitute the names of the legal representatives of the decree-holder. Rule 1 of order XXII does apply to execution proceedings; only rules 3, 4 and 8 of that order do not apply. There can, therefore, be no abatement of the application for execution. Rule 16 applies only to substitution along with execution and there does not appear to me to be any bar under any of the rules in schedule I of the Code of Civil Procedure to substitution of names by an executing court when an execution proceeding is already pending.

Apart from this, the application of the 18th of February, 1922, was a step in aid of execution as warning the judgement-debtors that the decree-holder had died and that Durga Prasad and others desired subsequently to take proceedings in execution. This was giving the judgement-debtors an opportunity to object

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if they liked, and they did not object. There can be no doubt that an application for substitution of names is a step in aid of execution. A Bench of this Court has held accordingly in *Pitam Singh* v. *Tota Singh* (1). A judgement of the Madras High Court in *Annamalai Mudaliar* v. *Ramier* (2) is of considerable interest when applied to the facts of the present case. There the application was made to the court which passed the decree, but the objection taken was that it was merely an application for substitution and not one for execution as required under section 232 of the previous Code of Civil Procedure, corresponding to order XXI, rule 16. The learned Judges repelled this objection in the following words :—

"We are unable to agree with this conclusion. The petition, as appears from its terms, was intended as a step in aid of execution, as it sought the recognition by the court of the petitioner's right to execute, which recognition it was open to the court to grant or withhold. The question then arises, was it an application in accordance with law? It is no doubt true, as pointed out by Sir Bhashyam Aiyangar in *Ramchandra Aiyar* v. *Subramania Chettiar*, 14 M. L. J., 393, that section 232, Civil Procedure Code, does not provide for an application in this form, but contemplates that the transferee should apply for execution of the decree without any preliminary of the kind, merely giving notice of the application to the transferor and the judgement-debtor. Consequently when, instead of applying for execution, the appellant put in his application for recognition as transferee, the court might have returned the petition to him for amendment as not in accordance with the section. Instead of doing this, the court made the order prayed for and the defendant did not appeal against it as he might have done. Under these circumstances the application must be taken to have been in accordance with law".

In the present case also it was open to the judgement-debtors to object to the jurisdiction of the Fatehabad court or to the form of the application. They did

(1) (1907) I.L.R., 29 All., 301. (2) (1908) I.L.R., 31 Mad., 234.

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neither. Whether Durga Prasad and others conceived their remedy rightly or wrongly, it seems clear that the application of the 18th of February, 1922, was a step in aid of execution, that is, they filed the application in the desire to further their object of executing the decree.

I set aside the order of the lower court, dated the 14th of June, 1927, and direct that court to proceed with the application for execution, dated the 15th of December, 1926. The applicant shall receive the costs of this Court from the opposite party.

Order set aside.

FULL BENCH.

Before Justice Sir Cecil Walsh, Mr. Justice Lindsay and Mr. Justice Banerji.

Before Mr. Justice Boys and Mr. Justice Iqbal Ahmad.

1927 *November*, 11.

1928 *January* 19.

EMPEROR *v.* SHERA AND OTHERS.*

Criminal Procedure Code, section 307—Jury—Power of High Court to revise the verdict of a jury on the merits.

Where a jury has given its verdict on the facts of the case, it is open to the High Court to revise that verdict on a reference by the trial Judge made under section 307 of the Code of Criminal Procedure, where it is not alleged that there has been any misdirection by the Judge or any misunderstanding by the jury of the law as laid down by the Judge. *Wafadar Khan* v. *Queen-Empress* (1), *Emperor* v. *Lyall* (2), *Reg.* v. *Khanderav Bajirav* (3), *Emperor* v. *Chellan* (4), *Emperor* v. *Bhuilotan Singh* (5), and *Emperor* v. *Panna Lal* (6), referred to.

*Criminal Reference No. 481 of 1927.

(1) (1894) I.L.R., 21 Calc., 955. (2) (1901) I.L.R., 29 Calc., 128.
(3) (1875) I.L.R., 1 Bom., 10. (4) (1905) I.L.R., 29 Mad., 91.
(5) (1921) 6 Pat. L.J., 264. (6) (1924) I.L.R., 46 All., 265.

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THIS was a reference made under the provisions of section 307 of the Code of Criminal Procedure by the Sessions Judge of Benares. The facts of the case are fully set forth in the order of the Bench before which the reference was first laid, which was as follows :

BOYS and IQBAL AHMAD, JJ. :—Eleven persons were charged in connection with a riot which took place in jail. Two were sent up for trial under sections 147 and 326 of the Indian Penal Code and the remaining nine for trial upon charges under section 326/149 of the Indian Penal Code. The trial was held with the aid of a jury. Two of the accused pleaded guilty under section 326 of the Indian Penal Code, the remainder denied their guilt of any offence at all and claimed that they had had nothing to do with the nose-cutting, which was the basis of the charge under section 326, and had at the most clamorously demanded their right to the remedy of certain grievances. The jury accepted this view and found a verdict of guilty against the two men Budhan and Shera, who had admitted the nose-cutting, and they were duly sentenced under section 326 of the Indian Penal Code.

The jury, however, acquitted the remaining nine men of the charge under section 326/149, and all the accused of the charge under section 147. The learned Judge has referred this case under the provisions of section 307 of the Code of Criminal Procedure, it being his view that the acquittal of nine of the accused upon the charge under section 147 of the Indian Penal Code was perverse. In view of the fact that Budhan Khan and Shera will, if this reference is accepted, be convicted of a further offence under section 147 of the Indian Penal Code, the learned Judge has refrained from

passing any sentence at present under section 326 of the Indian Penal Code, in regard to which the jury found these two men guilty.

In his first order of the 2nd of July, 1927, recording the verdict of the jury, the learned Judge says:—"The jury return an unanimous verdict as follows. They find all the accused not guilty of rioting and Shera and Budhan alone guilty of causing grievous hurt under section 326 of the Indian Penal Code according to their plea of "guilty". They are of opinion that the accused only came to the grating to make a complaint about ill-treatment, including short rations, to the District Magistrate. They are not satisfied that any of the accused created any disturbance by throwing bricks. They are not satisfied that any of the accused removed the batons from the latrine and wielded them. They find it as a fact that the two accused committed the offence of grievous hurt under provocation".

It will be seen that the jury were unanimously of opinion that they were "not satisfied that any of the accused created any disturbance by throwing bricks". They were "not satisfied that any of the accused removed the batons from the latrine and wielded them". They were satisfied that "the accused only came to the grating to make a complaint about the ill-treatment". These are very specific findings of fact by the jury that the nine accused did not commit any offence of riot, and the findings are, as we have said, purely findings of fact and not findings arrived at in any way whatever upon any misconception of the law applicable to facts.

We have, then, to consider whether we have any power to interfere with these findings of fact.

The powers which we have are obviously those laid down in section 307 (3) of the present Code of Criminal

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Procedure. We are informed that this Court has sometimes interfered under circumstances similar to the present, but we have grave doubts as to our power to so interfere. The powers that we can exercise are "any of the powers which it (the High Court) may exercise on an appeal". The powers which this Court may exercise on an appeal are laid down in section 423 of the Code of Criminal Procedure. Certain powers are specified in sub-section (1) of section 423, but those powers cannot be unconditionally exercised. They are expressly limited in the case of the verdict of a jury to cases where the court is of opinion that there has been a misdirection by the Judge or a misunderstanding on the part of the jury of the law as laid down. So this High Court cannot, in the ordinary exercise of its appellate powers, interfere with the finding of fact by a jury, except as provided by sub-section (2) of section 423.

Is there any thing in section 307 (3) which extends these powers? The sub-section (3) plainly says that this Court can exercise "any of the powers which it may exercise on an appeal". So far, then, it cannot interfere with the finding of a jury on the facts unless there has been some misdirection by the Judge or a misunderstanding of the law by the jury. In this case it is not suggested that there has been either. It is true that section 307 (3) contains later the words: "It shall, after considering the entire evidence, etc., etc.". But these words are preceded by the very definite direction that the consideration of the evidence is to be "subject thereto". That is clearly "subject to the powers which it may exercise on an appeal". We find ourselves entirely unable to give any effect to these words "subject thereto" unless the effect is to incorporate into section 307 the limited powers of the appellate court as laid down in section 423. We should, therefore, have no hesitation whatever ourselves in

holding that we cannot interfere with simple findings of fact by a jury, unless they have been accompanied by a misdirection of the Judge or a misunderstanding of the law by the jury as laid down by the Judge.

This result is in our view not only compelled by the ordinary proper and reasonable view of the meaning of the language of section 307 (3), but we are fortified by the consideration that it is only in accordance with what would seem to be demanded in justice to the accused. It is manifest that at any rate the convicted person cannot appeal against the findings of fact arrived at by a jury, except where the conditions of section 423 (2) are applicable. It would be anomalous indeed if any accused person was wholly deprived of the right of appeal on the facts where he has been convicted, while the Judge was given, so far as the Legislature is concerned, what amounts to an unrestricted right of appeal against a finding of the jury on the facts in favour of the accused person.

This last consideration has not weighed with us in arriving at the proper interpretation of section 307 (3). In our view that section read with section 423 can have only the effect which we have suggested above.

There is a case reported, *Queen-Empress* v. *Mc Carthy* (1), in which it was held that section 307 was not controlled by the limitation in what is now section 423 (2) and was at the date of that decision section 423, clause (*d*), of Act X of 1882. Since, however, that case was decided the law has been amended in Act V of 1898. Section 307 of Act X of 1882 reads: "In dealing with the case so submitted the High Court may exercise any of the powers which it may exercise on an appeal, but it may acquit or convict the accused of any offence of which the jury could have convicted him upon the charge framed and placed before it, etc.".

(1) (1887) I.L.R., 9 All., 420.

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Here it will be noticed that the limiting words "subject thereto" find no place; but on the other hand the phraseology rather extends the powers of the court than limits them where the phrase follows "but it may acquire or convict, etc.". It is clear therefore that the decision in *Queen-Empress* v. *McCarthy* (1) is of no authority under the new Code.

It is, however, because we are aware that it has at any rate sometimes happened in this Court that Judges have, when declining to interfere on the ground that verdict was not perverse, seemed to imply that they had a power unrestricted by section 423 (2) to interfere on the facts if the verdict was perverse, that we think it necessary to refer this case to a Full Bench. We, therefore, direct that this case be laid before the Hon'ble the CHIEF JUSTICE with a view, if he thinks fit, to its being laid before a Full Bench for determination of the following question :—

Where a jury has given its verdict on the facts of the case, is it open to this Court to revise that verdict on a reference by the trial Judge made under section 307 of the Code of Criminal Procedure, where it is not alleged that there has been any misdirection by the Judge or any misunderstanding by the jury of the law as laid down by the Judge?

Before the Full Bench,—

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

The opposite parties were not represented.

The following judgements were delivered by the Full Bench :—

WALSH, J. :—The following question has been referred by a Bench of two Judges, who were considering a reference under section 307 of the Code of Criminal Procedure, where the Sessions Judge had referred the

(1) (1887) I.L.R., 9 All., 420.

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matter because he disagreed with the verdict of acquittal by the jury :—

"Where a jury has given its verdict on the facts of the case, is it open to this Court to revise that verdict on a reference by the trial Judge made under section 307 of the Code of Criminal Procedure, where it is not alleged that there has been any misdirection by the Judge or any misunderstanding by the jury of the law as laid down by the Judge?".

The reason for the appointment of the Full Bench constituted to answer that question is given in the opinion delivered by the two Judges. They felt a difficulty owing to the presence of the words "subject thereto" in section 307 of the Code of Criminal Procedure, referring, as these words undoubtedly do, to the powers which a High Court may exercise on an appeal. Finding that in hearing an appeal an appellate court is governed by the provisions of sub-section (2) of section 423 of the Code of Criminal Procedure, which provides that the court shall not alter or reverse a verdict of a jury unless it is of opinion that it is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the jury of the law as laid down, they felt a grave doubt as to whether a High Court, to which a case is referred under section 307 of the Code of Criminal Procedure, could arrive at a decision other than the verdict of the jury on a question of fact, unless one or other of these conditions had been fulfilled.

The first point to be observed is that the High Court sitting under section 307 of the Code of Criminal Procedure is not sitting as a court of appeal, and in strict phraseology, is not asked to reverse or alter the verdict of a jury.

The second point to be noted is that this difficulty appears to have been felt, or at any rate raised, for the

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first time. A reference to the authorities will show that both before 1896 (a material date as will appear in a moment), and since 1896, the practice of the High Courts has been consistent in deciding these cases, and if they saw fit, High Courts have arrived at a definite decision on a question of fact inconsistent with the verdict of the jury. That is shown by reference to *Wafadar Khan* v. *Queen-Empress* (1), which was before 1896; *Emperor* v. *Lyall* (2) which was after 1896; *Reg.* v. *Khanderav Bajirav* (3) which was before 1896; *Emperor* v. *Chellan* (4) which was in 1905; *Emperor* v. *Bhuilotan Singh* (5) which was in 1921; and, in our own High Court, to the case of *Emperor* v. *Panna Lal* (6), as recently as 1924.

Moreover, Mr. Justice BOYS, in his well-known work on the Code of Criminal Procedure, adopts the relevant portions of the judgement in the case of *Reg.* v. *Khanderav Bajirav* (3) and states that on a reference the whole case is opened out, and the functions of both Judge and jury are cast upon the court, and that this differentiates the position very widely from that of the courts in England.

A further point to be noted is that a change took place in 1896. By an amending Act this section was altered, and although it was not changed in substance, these words "subject thereto" appeared for the first time in sub-section (3). Nobody would contend, and the referring order does not suggest, that without the words "subject thereto" there would be any difficulty at all, and therefore it must be taken that down to 1896, there was no doubt about the existence of this special power of dealing with a case on the merits, and finding facts on the evidence inconsistent with the

(1) (1894) I.L.R., 21 Calc., 955.
(2) (1901) I.L.R., 29 Calc., 128.
(3) (1875) I.L.R., 1 Bom., 10.
(4) (1905) I.L.R., 29 Mad., 91.
(5) (1921) 6 Pat. L. J., 264.
(6) (1924) I.L.R., 46 All., 265.

verdict of a jury, on a reference by the trial court to the High Court. It would be strange if a statutory provision of an exceptional character unknown to the English criminal law, specially provided in India and acted upon in all High Courts, were intended by the Legislature to be taken away completely by a sort of indirect introduction of two small words into a section, the substance of which they were not altering.

As, however, the point has been raised in a concrete form, and has not been precisely raised before, we think we ought to give our reasons by reference to the section itself for disagreeing with the view suggested in the referring order.

It must be admitted that if the words "subject thereto" are to be read as incorporating section 423 and as a consequence imposing upon the High Court, in hearing a reference, the limitation contained in section 423, sub-section (2), it would destroy substantially the elaborate provisions of section 307 itself, and defeat the object which we think the language of the section makes quite clear and for which the section was enacted. As we have already said, section 307 creates a special power of reference, turning the High Court for the moment into a Court exercising powers of reference or of a referee, and gives general directions as to how the Court is to be guided in exercising that function. In other words, it deals with the creation of a power independent altogether from the function of an appellate court, and, except by implication, makes no provision for procedure. It says that in a case where the Judge disagrees with the verdict and is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court, he shall do so, recording the grounds of his opinion, and there-

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it is to be observed, is a provision which throws an important light on the object of the section), when the verdict is one of acquittal, stating the offence which he considers to have been committed. That language is totally inappropriate and inconsistent with a limited power, as suggested, of a High Court, when dealing with a reference where there has been an unsatisfactory verdict by a jury, so as to restrict its consideration to some question of law or misapprehension of law.

The third sub-section of section 307, which finally prescribes the function to be exercised by the High Court in dealing with such a reference, provides that after considering the entire evidence, and after giving due weight to the opinions of the Sessions Judge and the jury, it shall acquit or convict the person charged of any offence of which the jury could have convicted him upon the charge as framed. That language is entirely meaningless if it was not, at any rate, intended to give the High Court not merely a power but a direction to reconsider the entire evidence and what has happened in the court below, and to arrive at an independent conclusion of its own on the question of fact, as well as of law, in the interests of justice.

The question therefore is whether the words "subject thereto" are strong enough and clear enough, as is suggested in the referring order, to override and destroy the other provisions of the section, which, as we have pointed out, are wholly inconsistent with the limitations contained in section 423, sub-section (2). It is true to say that in the interpretation of every section of a Statute a reasonable construction must be given to every word contained therein. Speaking for myself I feel no difficulty whatever in interpreting the words "subject thereto" consistently with the operation of section 307 as it has always been hitherto understood and worked. When it is once borne in mind that the

section itself deals with the functions to be exercised, and does not attempt to deal specifically with the procedure to be followed, all difficulty to my mind disappears. The High Court is not acting as a court of appeal, but it is to be clothed with the powers of a court of appeal as regards its procedure. If the Legislature had intended to limit its function in the way suggested, nothing was easier than to say: "subject to the limitations or provisions contained in section 423, sub-section (2)". It does not even refer to any section. What it says is that the High Court may exercise any of the powers which it may exercise on an appeal, and subject thereto it shall exercise the following functions. I think the emphatic word there is the word "any", and that the object of that part of the sub-section was simply to clothe the High Court, when acting under section 307, with all the powers as regards procedure of a court of appeal, if for good reasons it desires to exercise any of them. The exercise of such powers may be illustrated by reference, not merely to section 423, which requires that it shall hear the appellant or his pleader, if he appears, and provides for other matter, but it would include such a provision as section 426, where, if there has been a conviction and the referring court thought it was wrong, the person charged could be released on bail; or, to give another illustration, section 428, where the High Court, if it thinks additional evidence to be necessary, shall record its reasons, and may either take such evidence itself, or direct it to be taken by a Court of Session. We are clearly of opinion that if it were not for the provision which has caused this reference, it would not be possible for a High Court, adjudicating upon a reference, to ask for or direct additional evidence to be taken, and therefore it follows that the introduction of these words was made in order to empower the High Court to take that or any other step which it

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would take if it were in fact an appellate court hearing an appeal.

It is suggested in the referring order that it would be anomalous for the accused to be deprived of a right of appeal against an adverse verdict on the facts, while the Sessions Judge is given what is called "an unrestricted right of appeal against a finding by the jury on the facts in favour of the accused person". I do not think there is any anomaly. The power of reference under section 307 applies whether the verdict is one of "guilty" or of "not guilty".

For these reasons I think that the question must be answered in the affirmative.

LINDSAY, J. :—I agree, and only wish to add that I consider that the words "subject thereto" in subsection (3) of section 307 should be taken to refer not merely to the word "powers" which precedes them but to the exercise of the powers. That is to say, the High Court, after resort to such of the powers of an appellate court as it may think fit to exercise, shall proceed, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury, to acquit or convict the accused.

BANERJI, J. :—I agree.

[On receipt of the Full Bench decision their Lordships of the referring Bench examined the entire evidence in the case in order to see whether the jury were or were not justified in acquitting the accused who were put on trial before the Judge, and came to the conclusion that the offence of rioting in which the accused took part was made out in respect of seven out of the nine accused and passed judgement convicting and sentencing them accordingly.]

REVISIONAL CRIMINAL.

Before Mr. Justice Dalal.

EMPEROR *v.* MATHURA RAI AND ANOTHER.*

1928
January, 24.

Act No. XLV of 1860 *(Indian Penal Code), section* 447—*Criminal trespass—Essential ingredients of offence.*

It is essential to the validity of a conviction of the offence of criminal trespass that the court should find the offence to have been committed with one or other of the intentions named in section 447 of the Indian Penal Code, viz., either to commit an offence or to intimidate, insult or annoy the party in possession. *Emperor* v. *Jangi Singh* (1), followed. *Ghasi* v. *Emperor* (2), referred to.

THIS was an application in revision against an order of the Sessions Judge of Ghazipur. The facts of the case sufficiently appear from the order of the Court.

Pandit *Ambika Prasad Pande,* for the applicants.

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

DALAL, J. :—Both the subordinate courts have gone out of the way to make out a criminal charge against the two applicants, Mathura Rai and Sukhdeo Rai. These men are zamindars of a particular field which had been mortgaged to one Raghunath Prasad. During the period of the mortgage, the complainant Ram Prasad was in cultivating possession of the land. When the mortgage was redeemed, the applicants desired to obtain through the revenue court cultivating possession of the land, but their application was rejected as they had been out of possession for over 12 years. Ram Prasad continued to be the tenant of the land. He complained to the criminal court under sections 447 and 426 on the following alleged facts :—That on the

*Criminal Revision No. 748 of 1927, from an order of K. G. Banerji, Sessions Judge of Ghazipur, dated the 22nd of October, 1927.

(1) (1903) I.L.R., 26 All., 194. (2) (1917) 15 A.L.J., 793.

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EMPEROR v. MATHURA RAI.

21st of July, 1927, soon after sunrise, he happened to go to another field of his when he noticed the applicants uprooting *parwar* crop growing in this particular field 125/2. He went up and protested, whereupon the applicants threatened to beat him. His allegations did make out an offence under section 441 because it was alleged that the applicants entered the field of the complainant with intent to commit the offence of mischief. The magistrate of the trial court disbelieved the evidence of the offence and came to the conclusion that the field was fallow on the date of the alleged occurrence and no crop, *parwar* or other, grew there on that date. Under the circumstances one would have expected the applicants to be acquitted when their intention of committing an offence was disproved. The magistrate, however, went on to make out a case which was never submitted to him for consideration. He was of opinion that the applicants had forcibly ejected the complainant and thereby committed an offence under section 447. He does not explain how forcible dispossession, which was a civil matter and gave to the tenant a cause to proceed under section 79 of the Tenancy Act then prevailing, would constitute a criminal offence. The magistrate of the appellate court made this clear by presuming that the intention of the applicants was to annoy the complainant. There was no question of insult and the allegation of intimidation had been disbelieved by the trial court. The magistrate of the appellate court, however, could not have read the statement of the complainant. The complainant was put in the witness-box and he never alleged, nor was he ever questioned, that the act of the applicants annoyed him. He could not have been annoyed because he himself sought a false cause for the charge of criminal trespass which he would not have done if he had a true one to rely on of an annoyance to himself. The levity with

which the criminal courts apply penal statutes is much to be deprecated. I often observe that a magistrate, when he feels that he has stretched a point in spreading the net of a criminal charge, thinks that he salves his conscience by imposing only a fine which he thinks is a matter of little consequence. The learned Chief Justice, Sir JOHN STANLEY, emphasized the necessity of proof of an intention to commit an offence or to intimidate, insult or annoy before a conviction was recorded under section 447: *Emperor* v. *Jangi Singh* (1). The learned Assistant Government Advocate quoted by way of a reply the case of *Ghasi* v. *Emperor* (2). There is, however, no discussion in that case of the ingredients which ought to form the basis of a charge under that section. The learned CHIEF JUSTICE observed at p. 195:

"It has not been proved in this case, and indeed it has not been asserted, that the applicant took possession with intent to commit an offence, or with intent to intimidate, or insult or annoy the party in possession. The applicant is a zamindar of the property in question, and he alleges that he took possession on the abandonment of the land by his tenant. His intention possibly was to obtain possession contrary to law, but this of itself would not constitute criminal trespass".

In the present case the intention to commit an offence was disbelieved, as also the intention to intimidate, and the complainant never asserted that he was either insulted or annoyed. Obviously, the complainant desired to avoid expenditure on court fee and the bar of limitation and instead of seeking his proper remedy in the revenue court came to the criminal court on false allegations. It is a pity that he succeeded in this device. I set aside the conviction and sentence of the applicants and direct that any fine recovered from them shall be refunded.

Conviction quashed.

(1) (1903) I.L.R., 26 All., 194. (2) (1917) 15 A.L.J., 793.

APPELLATE CIVIL.

Before Sir Grimwood Mears, Knight, Chief Justice and Mr. Justice Mukerji.

1928 *January*, 24.

RUCHCHA SAITHWAR AND ANOTHER (PLAINTIFFS) *v.* HANSRANI AND OTHERS (DEFENDANTS).*

Civil Procedure Code, section 109, *clause* (c)—*Application for leave to appeal to His Majesty in Council—Valuation of case less than Rs.* 10,000—"*Substantial question of law*".

Ordinarily none but the parties to a litigation are concerned with the result of a case. In every such case, where the valuation is less than the prescribed limit, there is no right of appeal to His Majesty in Council. It is only when a case is of larger importance and the principle, when finally decided by their Lordships of the Privy Council, will be of benefit, not only to the people who are directly involved in the litigation, but to a considerable body of other people, that leave to appeal should be granted. *Radhakrishna Ayyar* v. *Swaminatha Ayyar* (1), *Banarsi Prasad* v. *Kashi Krishna Narain* (2), and *Mathura Kurmi* v. *Jagdeo Singh* (3), followed.

The mere question whether a particular finding by a lower appellate court was a good or bad finding, having regard to the provisions of section 100 of the Code of Civil Procedure, is, in itself, no substantial question of law. *Durga Chowdhrani* v. *Jewahir Singh Chowdhri* (4), followed.

THIS was an application for leave to appeal to His Majesty in Council. The nature of the case in which leave to appeal was sought, and the grounds put forward by the applicants in support of their contention that leave should be granted are set forth in the judgement of the Court.

*Application No. 56 of 1927 for leave to appeal to His Majesty in Council.

(1) (1920) I.L.R., 44 Mad., 293. (2) (1900) I.L.R., 23 All., 227.
(3) (1927) I.L.R., 50 All., 208. (4) (1890) I.L.R., 18 Calc., 23.

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RUCHCHA SAITHWAR v. HANSRANI.

Babu *Piari Lal Banerji*, for the applicants.

Mr. *P. N. Sapru*, for the opposite party.

MEARS, C. J., and MUKERJI, J. :—This is an application under order XLV, rule 2, of the Civil Procedure Code for leave to appeal to His Majesty in Council from a decree of this Court passed in second appeal on the 23rd of June, 1927. The valuation of the subject-matter of the suit and of the appeal is less than Rs. 10,000, being in fact Rs. 2,800 only. The ground on which the leave to appeal is sought is that it involves "a substantial question of law of general importance and is otherwise fit for appeal, as the plaintiffs have been deprived of a valuable right secured to them by the decree of the appellate court." It is conceded by the learned counsel for the applicants that leave to appeal can be given only if the case should fall within clause (*c*) of section 109 of the Code of Civil Procedure.

It appears that the applicants were the plaintiffs in the court of first instance. They sued for recovery of certain properties on the allegation that they were joint with one Chikuri, who left him surviving a wife and three daughters, all four of whom were the defendants in the suit. The plaintiffs' case was that on the death of Chikuri they, as the surviving members of the family, were entitled to the property in suit. The defence was that Chikuri died separate, and the plaintiffs have no right to the property. The court of first instance dismissed the suit, holding that the plaintiffs were separate from Chikuri when the latter died. There was an appeal by the plaintiffs and the learned Additional District Judge, who heard the appeal, held on the evidence that the family was joint and that the plaintiffs were, therefore, entitled to succeed. He accordingly decreed the suit. There was a second appeal, which was heard by a Bench of this Court.

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This Court came to the conclusion that the lower appellate court had arrived at its conclusion by a misapplication of the law. The following is an extract from the judgement of this Court:

"The respondents urge that whether the lower appellate court was right or wrong, the finding as to jointness was a finding of fact. The question whether it can be disturbed in second appeal depends, therefore, on whether the lower appellate court in arriving at that finding had committed any error of law."

Thus, after reproducing the purporting of sub-section (1) of section 100 of the Code of Civil Procedure, the Judges proceeded to consider whether the finding arrived at by the lower appellate court was wrong, and whether it was vitiated on account of any substantial error in procedure. Mr. *Piari Lal Banerji*, the learned counsel for the applicants, states that so far as the portion of the judgement quoted above goes, he has no quarrel with it. But he says that in spite of stating the law correctly, the learned Judges proceeded to misapply it to the circumstances of the case and have virtually taken upon themselves to weigh the evidence and to say that the finding of fact arrived at by the lower appellate court was wrong. He does not deny that in cases to which section 103 of the Code of Civil Procedure applies, the High Court could come to a finding of its own.

Assuming that this Court misapplied the law to the particular facts of the case, we fail to see how it is possible for us to certify the case as a fit one for appeal to His Majesty in Council.

It has been held repeatedly by their Lordships of the Privy Council that in order to enable a High Court to certify a case, in which the valuation is less than Rs. 10,000, as a fit one for appeal to His Majesty in Council, the case should involve a question of general

importance. Ordinarily, none but the parties to a litigation are concerned in the result of a case. It is clear that in every such case where the valuation is less than the prescribed limit, there is no right of appeal to their Lordships of the Privy Council. It is only when a case is of larger importance and the principle, when finally decided by their Lordships of the Privy Council, will be of benefit not only to the people who are directly involved in the litigation but to a considerable body of other people, that leave to appeal should be granted. In the case of *Radhakrishna Ayyar* v. *Swaminatha Ayyar* (1) their Lordships of the Privy Council, on the question of the application of sub-section (*c*) of section 109 of the Code of Civil Procedure, said as follows :—

"That principle is this :—that as an initial condition to appeal to His Majesty in Council, it is essential that the petitioners should satisfy the court that the subject-matter of the suit is Rs. 10,000, and in addition that in certain cases there should be added some substantial question of law. This does not cover the whole grounds of appeal, because it is plain that there may be certain cases in which it is impossible to define in money value the exact character of the dispute; there are questions as, for example, those relating to religious rights and ceremonies, to caste and family rights or such matters as the reduction of the capital of the companies as well as questions of wide public importance in which the subject-matter in dispute cannot be reduced into actual terms of money. Sub-section (*c*) of section 109 of the Code of Civil Procedure contemplates that such a state of things exists, and rule 3 of order XLV regulates the procedure."

This quotation from the judgement of the Privy Council enunciates the reason why in certain cases leave to appeal may be granted, although the valuation of the subject-matter of the appeal may be less than Rs. 10,000. In the present case there is no dispute as to any question of law at all. It is conceded that in the judgement under appeal the law has been properly stated, namely, as to

(1) (1920) I.L.R., 44 Mad., 293.

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when a second appeal may be entertained by the High Court. The only point that the applicants want to dispute before their Lordships of the Privy Council is whether the High Court were right in their application of the law to the peculiar facts of this particular case. This is not, in our opinion, a matter of the kind described in the above quotation from the judgement of their Lordships of the Privy Council.

It must be remembered that leave to appeal is a matter of consequence, and in the case of *Banarsi Prasad* v. *Kashi Krishna Narain* (1) their Lordships of the Privy Council made the following pronouncement at page 232 of the report :—

"And as it is of great importance not to allow litigants who have succeeded in the High Courts to be harassed by further appeals when there is nothing at stake but amounts of money which the Indian legislature has decided to be too small to give a right of appeal, their Lordships will humbly advise Her Majesty to dismiss this appeal."

It will be noticed, therefore, that where no useful purpose as defined in the case of *Radhakrishna Ayyar* v. *Swaminatha Ayyar* (2) is likely to be served and where, in the result of the appeal, the only people interested will be the litigants themselves and where the value of the subject-matter is less than Rs. 10,000, no leave to appeal should be granted; see *Mathura Kurmi* v. *Jagdeo Singh* (3).

The learned counsel for the applicants has referred us to cases where their Lordships of the Privy Council set aside decrees of the High Court on the ground that the High Court could not interfere with a finding of fact arrived at by the lower appellate court, and that to do so was a contravention of the law. His argument was that leave to appeal in such cases must have been granted on

(1) (1900) I.L.R., 23 All., 227. (2) (1920) I.L.R., 44 Mad., 293.
(3) (1927) I.L.R., 50 All., 208.

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the sole ground that the High Court had exceeded its jurisdiction in setting aside improperly a finding of fact. We cannot accede to this argument, and Mr. *Banerji* has not been able to cite a single case in which leave to appeal was granted on the sole ground that the High Court in a particular case misapplied the provisions of section 100 of the Code of Civil Procedure. On the other hand, in one of the cases quoted by the learned counsel for the applicants, their Lordships of the Privy Council deprecated the grant of a certificate by a High Court where the court had refused to interfere with the finding of the lower appellate court on the ground that it was a finding which could not be interfered with in second appeal, being a finding of fact. Their Lordships remark that no substantial question of law was involved in the appeal. We take this to mean and involve that the mere question whether a particular finding by a lower appellate court was a good or bad finding, having regard to the provisions of section 100 of the Code of Civil Procedure, was, in itself, no substantial question of law. See *Durga Chowdhrani* v. *Jewahir Singh Chowdhri* (1).

We, therefore, dismiss the application with costs.

Application dismissed.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Mukerji.

1928 *January*. 25.

DAU DAYAL (DEFENDANT) *v.* PIARI LAL AND OTHERS (PLAINTIFFS) AND KANTHI RAM AND OTHERS (DEFENDANTS).*

Act No. IX of 1908 (*Indian Limitation Act*), *schedule* I, *article* 85—*Limitation—Principal and agent.*

Defendants, who were dealers in grain, employed the plaintiffs as commission agents and provided (as principals)

* First Appeal No. 326 of 1924 from a decree of C. Deb Banerji, Subordinate Judge of Bareilly, dated the 8th of July, 1924.

(1) (1890) I.L.R., 18 Calc., 23 (30).

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to start with certain sums of money to serve as cover. Plaintiffs were then asked to make certain purchases in the market. The plaintiffs made the purchases, spent for the purpose what money of the defendants they had, and, when necessary, supplied the balance out of their own funds. The amount advanced by the defendants was credited to them in their account. The amount paid by the plaintiffs was debited to the defendants in the same account. Defendants were further debited with plaintiffs' commission and incidental charges. Later on, plaintiffs debited defendants' account with interest on the money they had spent on behalf of defendants. The next transaction might be one of purchase or one of sale of goods previously purchased. If it was a case of purchase, the same process of entry in the account would be gone through. If, however, there was a transaction of sale of goods previously purchased under the orders of defendants, plaintiffs sold the goods, credited defendants with the price fetched, and debited them with plaintiffs' commission and incidental charges. These transactions continued for about a year, and the year of account closed in October, 1920. On the 28th of March, 1923, plaintiffs sued to recover the balance which they alleged to be due to them on the account.

Held, that article 85 of schedule I to the Indian Limitation Act, 1908, applied, and the suit was not barred by limitation. *Sheo Partab Singh* v. *Brij Kishore* (1), *Namberumal Chetty* v. *Kotayya* (2), *Ram Pershad* v. *Harbans Singh* (3), *Bank of Multan* v. *Kamta Prasad* (4), *Velu Pillai* v. *Ghose Mahomed* (5), *Madhav Motiram* v. *Jairam Sakharam* (6), *Watson* v. *Aga Mehedee Sherazee* (7), and *Ratan Chand* v. *Asa Singh* (8), referred to.

THE facts of this case are fully stated in the judgement of the Court.

Dr. *Surendra Nath Sen* and Pandit *Uma Shankar Bajpai*, for the appellant.

Dr. *Kailas Nath Katju*, for the respondents.

(1) (1912) 15 Indian Cases, 336.
(2) (1913) 21 Indian Cases, 773.
(3) (1907) 6 C.L.J., 158.
(4) (1916) I.L.R., 39 All., 33.
(5) (1893) I.L.R., 17 Mad., 293.
(6) (1921) 23 Bom. L.R., 540.
(7) (1874) L.R., 1 I.A., 346.
(8) (1921) 62 Indian Cases, 898.

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MEARS, C. J., and MUKERJI, J. :—The appellant before this Court is one of the six defendants in the court below. The plaintiffs' case was this. They, with the defendant No. 6, Ram Gopal, constituted a firm of commission agents carrying on business under the name and style of Ram Gopal, Piari Lal, at Bareilly. The defendants Nos. 1 to 5 (the fifth being the appellant here) were a firm of dealers in grain under the name and style of Har Charan Lal, Piari Lal. Before the defendant firm started business with the plaintiffs and Ram Gopal, there was a firm, Kanthi Ram, Banwari Lal, owned by the first two defendants, who were residents of Budaun. The firm of Kanthi Ram, Banwari Lal employed the plaintiffs as commission agents. Later on, defendants Nos. 3 to 5 joined the aforesaid defendants Nos. 1 and 2 and constituted themselves into the firm of Har Charan Lal, Piari Lal, as is stated above, in order to carry on business at Bareilly. The plaintiffs were employed as commission agents and it was agreed that, if and when occasion arose, the plaintiffs would advance money to the defendants Nos. 1 to 5 in order that purchases might be effected. The plaintiffs were to get a certain rate of interest on the money they might advance, besides the commission and other incidental charges stipulated for. The transactions between the parties lasted from *Jaith, Sambat* 1976, (May-June, 1919), for about a year. After crediting the amounts payable by the plaintiffs to the defendants, a sum of Rs. 15,262-13 fell due as payable to the plaintiffs and defendant No. 6. The share of the defendant No. 6 was one-fourth. He has not joined in the institution of the suit. The plaintiffs, therefore, claim Rs. 11,400, being three-fourths of the entire claim. The defendant No. 5 alone contested the suit in the proper sense of the term. The other defendants appeared

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and filed written statements, but did not take any further interest in the defence. Two main defences were set up by the appellant (defendant No. 5). One was, that he was not a member of the firm Har Charan Lal, Piari Lal, and never employed the plaintiffs as his commission agents. His second plea was that the suit was barred by limitation.

The learned Subordinate Judge has held that the appellant was a member of the defendant firm, and the suit was not time-barred.

On the first point it is abundantly clear to us, on the evidence, that the appellant was a member of the firm Har Charan Lal, Piari Lal.

[The evidence was then discussed, and their Lordships came to the conclusion that Dau Dayal was a partner of the firm Har Charan Lal, Piari Lal. The judgement then continued :—]

The question of limitation has presented some difficulty. The learned Subordinate Judge held, on the authority of a case of this Court, *Sheo Partab Singh* v. *Brij Kishore* (1), and another case from the Madras High Court, *Namberumal Chetty* v. *Kotayya* (2), that article 85 of schedule I to the Indian Limitation Act, 1908, applied and the suit was within time, having been instituted within three years of the date of the last item in the account. The starting point of limitation under article 85 is not the date of the last item, but is the date of the close of the year of the account. This, however, does not make any difference. If article 85 of the Limitation Act applies, the claim would be undoubtedly within time.

(1) (1912) 15 Indian Cases, 336. (2) (1913) 21 Indian Cases, 773.

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The contention of the learned counsel for the appellant was that either article 61 applied, or article 83. During the latter portion of the argument, the learned counsel was more definite, and argued that article 83 was the more appropriate article. His contention was that every item of transaction must be taken independently, and as soon as the plaintiffs had spent money out of their own pocket for any purchase made by them or on account of any incidental charges, for the defendant, limitation began to start from the date of the advance, under the provision of the third column of article 83. As regards the claim for commission, his contention was that it was payable on account of "work done" and a suit should have been instituted within three years of the date of the earning of the commission. If these contentions be correct, there can be no doubt that the suit, or a major portion of it, would be time-barred.

The course of the transaction between the parties appears to have been as follows. The defendants, as principals, provided to start with certain sums of money to serve as margin money or cover for the satisfaction of the plaintiffs. The plaintiffs were then asked to make certain purchases in the market. The plaintiffs made the purchases, spent for the purpose what money they had, belonging to the defendants, towards the payment of the price, if any had to be paid at once, and supplied the balance out of their own funds. The amount advanced by the defendants was credited to them in their account. The amount paid by the plaintiffs was debited to the defendants in the same account. The defendants were further debited with plaintiffs' commission and incidental charges. Later on, the plaintiffs debited the defendants' account with interest for the money they had spent on behalf of defendants' account. The next transaction might be one of purchase or one of sale of the

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goods previously purchased. If it was a case of purchase, the same process of entry in the account book would be gone through as has been previously described. If, however, there was a transaction of sale of goods previously purchased under the orders of the defendants, the plaintiffs sold the goods, credited the defendants with the price fetched and debited them with the plaintiffs' commission and incidental charges. This sort of transactions continued for about a year. On these facts it has been contended for the plaintiffs that the contention of the learned counsel for the appellant cannot succeed but that the view taken by the learned Subordinate Judge, viz., that article 85 applied, was the right one.

It appears to us that the plaintiffs' contention is correct. The counsel for the parties are agreed as to the meaning to be given to the word "mutual" in article 85 of the Indian Limitation Act. They are agreed, and we agree with them, that, for the application of article 85, there should be independent transactions between the parties. In other words, there should be two sets of transactions. In one set, one of the parties should hold the position of a creditor and the other a debtor, and in the other set, the position should be reversed. The true import of the words "mutual, open and current account" has been discussed in great detail in the case of *Ram Pershad* v. *Harbans Singh* (1). We entirely agree with the observations of the learned Judges in that case when they say: "Mutual accounts are such as consist of reciprocity of dealings between the parties and do not embrace those having items on one side only, though made up of debits and credits." The learned Judges further point out that although a shifting balance, sometimes in favour of one side and sometimes in favour of the other, is a test of mutuality, its absence is not conclusive proof against mutuality. As already stated,

(1) (1907) 6 C.L.J., 158.

there is no difference in the contentions of the counsel for the parties as to what a mutual account is. The only question is whether, in their nature, the dealings between the parties had the character of mutuality. After careful deliberation, we have come to the conclusion that they had. Had there been no special agreement between the parties, the plaintiffs could have refused to enter or to conclude any transaction which involved an expenditure of their own money. They, did, however, agree to make advances, though the evidence does not disclose whether they put any limit on the amount of such advances or left the extent of their financing of the defendants dependent on their own decision. They were at perfect liberty to make, or to refrain from making, advances, but they did in fact continue to find money for the defendants during the short period of the agency, and they undoubtedly paid out from time to time their own moneys, either to complete a purchase or to meet an immediate liability of the defendants. As each instance occurred, they could have demanded the money in advance, or recoupment if they had already made the advance. The account between the parties showed, on the one side, advances made in accordance with the agreement together with interest, commission and minor incidental charges, and on the other side the receipts on the defendants' behalf. To the extent that the plaintiffs made advances, they were acting as bankers and the position was that of lender and borrower. To the extent of the receipts, the position was that of principal and agent, with a liability, as agent, to account. We think that the parties did stand to each other in a dual relationship, and that there was a mutuality of dealings, and article 85 would be applicable.

This being the conclusion at which we arrive on an examination of the principles and the statute law, we proceed to examine the authorities.

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For the appellant the learned counsel has cited, besides the case of *Ram Pershad* v. *Harbans Singh* (1) already mentioned, the cases of *Bank of Multan* v. *Kamta Prasad* (2), *Velu Pillai* v. *Ghose Mahomed* (3) and *Madhav Motiram* v. *Jairam Sakharam* (4). The first two cases are not directly in point, though no doubt they serve to explain what is meant by mutuality of account. The third case, in our opinion, goes to support, in principle, the plaintiffs' case. In this last-mentioned case, the plaintiff Jairam owned a ginning factory. He lent money to the defendants for buying cotton. The cotton, when purchased, was ginned and pressed by the plaintiff, who sold it on behalf of the defendants. The ginning and pressing charges, as well as the principal and interest, were debited to the defendants, and the sale proceeds of the cotton bales were credited into the defendants' account, as against the advances made by the plaintiff, the commission earned and other items. Under these circumstances it was held, following the Privy Council case of *Watson* v. *Aga Mehedee Sherazee* (5), that there was a mutuality of dealings, and article 85 applied. It is very difficult to differentiate, in principle, between this case and the case before us. The fact that to start with, the defendants had put the plaintiffs in possession of such funds, will not make any difference in principle. It was agreed in the case before us that, if and when occasion arose, the plaintiffs would act as the defendants' bankers by providing money. We have already made it clear that, when the defendants advanced the money, they really borrowed money, on defendants' behalf, from themselves, who were to be taken as acting at the time of lending the money as bankers and not as commission agents. In the Bombay case, the man who acted as

(1) (1907) 6 C.L.J., 158.
(2) (1916) I.L.R., 39 All., 33.
(3) (1893) I.L.R., 17 Mad., 293.
(4) (1921) 23 Bom. L.R., 540.
(5) (1874) L.R., 1 I.A., 346.

agent of the defendants in pressing and selling cotton also acted in a second capacity, viz., as that of a banker.

There are several decisions in which it has been held that where a man lends money in one capacity and in another capacity acts as an agent for the borrower and the two accounts are put together, there is a mutuality of dealing between the parties, although the money may have been lent for the express purpose of enabling the borrower to provide business as commission agents to the lender. Such a case was that of *Ratan Chand* v. *Asa Singh* (1) decided by the Lahore High Court in a Letters Patent Appeal. The plaintiffs in the case were money-lenders by profession and were also commission agents. The defendants were a firm who dealt in grain. The defendants used to send to the plaintiffs as commission agents grain to be stocked and sold. The plaintiffs, besides doing this business of commission agents, used to advance loans to the defendants, independently of the business of agency. It was held that article 85 was applicable to the suit, which was one to recover the balance after adjusting the two accounts. The mere fact that the plaintiffs were professional money-lenders and lent money to people other than those who dealt with themselves as commission agents, will not make any difference, in principle, between the case before the Lahore High Court and the one before us. As we have stated more than once, in so far as the plaintiffs agreed to lend money to the defendants for interest, they acted as the defendants' bankers. Whether they were also lending money to others or not is really immaterial. We have to look to the characters of the dealings and not to the professions of the parties.

In this Court, in the case of *Sheo Partab Singh* v. *Brij Kishore* (2) a similar question of limitation came up for decision. It was said that either article 85 or

(1) (1921) 62 Indian Cases, 898. (2) (1912) 15 Indian Cases, 336.

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article 120 of the Limitation Act applied. We have mentioned this case last, because no pronounced opinion was expressed in the case and also because the case was decided on what were found to be the peculiar facts of the case. Article 61, which was sought to be applied by the learned counsel for the appellants in the case, was not applied because of the said findings. But it is clear that their Lordships (it was a decision by two learned Judges) made the following remarks :

"There was an account between the parties extending over a number of years. The plaintiffs were always liable to account to the defendants for any profits that were made in the purchase and re-sale of grain and they were also liable to account for the deposit. On the other hand, the defendants were liable to the plaintiffs to pay interest on any moneys advanced by the plaintiffs and to make good any loss which might take place, which was not covered by the deposit. There was, therefore, a mutual, open and current account and there was a reciprocal demand between the parties."

With a slight alteration of language, we should be prepared to adopt the argument of the learned Judges as our own.

A consideration of the authorities, therefore, leads us to the same result as a consideration of the principle and the language of the Statute.

We hold with the court below that article 85 of the Limitation Act applies, but we differ from the court below as to the date from which the limitation should start. According to the third column of article 85, the limitation starts from the close of the year. In this case there is the evidence of the plaintiffs' *munib* that the year of the account closed with the *Dewali* festival, which in the year in question must have fallen some time in October, 1920. The suit having been filed on the 28th of March, 1923, was within time.

The result is that the appeal fails on both the points raised. It is hereby dismissed with costs.

Appeal dismissed.

Before Mr. Justice Sulaiman and Mr. Justice Kendall.

GANESHI LAL AND OTHERS (PLAINTIFFS) *v.* ROHNI RUKUMDHUJ PRASAD SINGH (DEFENDANT).* 1928 *January*, 30.

Act No. IV of 1882 *(Transfer of Property Act), sections* 83 *and* 84*—Mortgage—Redemption—Deposit of mortgage money in court—Conditions necessary for an effective deposit—Dispute as to minority of mortgagee.*

In order that the consequences attached by section 84 of the Transfer of Property Act, 1882, to a tender made under section 83 of the same should ensue, it is necessary that the mortgage money should be deposited to the credit of the real mortgagee, and of him alone. Hence, where the mortgagee was a person in whose family the custom of primogeniture prevailed, and he died leaving him surviving two sons, it was *held* that a deposit of the mortgage money to the credit of both the sons was not a valid deposit within the purview of section 83. *Debendra Mohan Rai* v. *Sona Kunwar* (1), and *Madhavi Amma* v. *Kunhi Pathumma* (2), followed. *Ram Sumran* v. *Sahibzada Bijai Partab Narain Singh* (3), doubted.

If, upon a deposit being made, a question arises as to the majority or minority of the person in whose favour the money is deposited, the question must be decided by the court and a guardian *ad litem* appointed, if necessary. *Ruckmani* v. *Veerasami* (4), *Kannu Mal* v. *Indarpal Singh* (5), *Pandurang* v. *Mahadaji* (6) and *Gokul Kalwar* v. *Chandar Sekhar* (7), referred to.

THIS was a plaintiffs' appeal arising out of a suit for redemption of a simple mortgage, dated the 22nd of January, 1922, executed by the plaintiffs' predecessor in favour of Mitangdhwaj Prasad Singh, the deceased father of the original defendants. The only point in dispute was whether, in consequence of a deposit having been made under section 83 of the Transfer of Property

*First Appeal No. 310 of 1925, from a decree of Alakh Murari, Second Additional Subordinate Judge of Agra, dated the 7th of February, 1925.

(1) (1904) I.L.R., 26 All., 291. (2) (1899) I.L.R., 23 Mad., 510.
(3) Weekly Notes, 1885, p. 328. (4) (1924) 47 M.L.J., 370.
(5) (1922) I.L.R., 45 All., 273. (6) (1902) I.L.R., 27 Bom., 23.
(7) (1926) I.L.R., 48 All., 611.

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Act, interest ceased to run from that date. On the 18th of July, 1923, the original mortgagee Mitangdhwaj Prasad Singh was dead and he had left two sons and a widow. On that date the plaintiffs deposited an amount which was admittedly sufficient to cover the principal and interest up to that date, to the credit of the two sons of Mitangdhwaj Prasad Singh, who were both described as minors. On that date the plaintiffs also filed an application to the court, praying that the mother of the minors should be appointed their guardian *ad litem* and this application was supported by an affidavit. Notices were sent to the minors and their mother. The latter appeared in court and filed a petition saying that the elder son was not a minor but a major, and that she could not therefore act as his guardian. The plaintiffs did not accept her statement, but requested that the court should inquire into that matter and also stated that if the court found that the elder son was of age the plaintiffs had no objection to treating him as such. The court refused to go into this disputed question of minority and ordered that the application should be "filed". The corresponding order on the order sheet showed that it was consigned to the record room.

The plaintiffs then instituted the present suit for redemption and claimed the benefit of the deposit of July, 1923. On behalf of the defendant No. 1, Shirdhwaj Prasad Singh, it was pleaded that he was of age on the date of the previous deposit and had not been represented in those proceedings. It was further pleaded that, by virtue of a family custom, the rule of primogeniture prevailed and it was only the eldest son who was entitled to the estate of his deceased father, and that therefore the deposit to the credit of both the sons was defective.

The trial court found that the defendant No. 1 was in fact a minor on the date of the deposit. But it found that there was a custom in the family under which it

was only the eldest son who succeeded to the estate. It also thought that the court rightly refused to go into the question of minority on the previous occasion, and that therefore the plaintiffs had not done all that they were bound to do under section 83, so as to entitle them to the benefit of the deposit.

The plaintiffs appealed.

Munshi *Narain Prasad Ashthana*, for the appellants.

Pandit *Uma Shankar Bajpai* and Pandit *Shiam Kishna Dar*, for the respondent.

The judgement of the Court (SULAIMAN and KENDALL, JJ.), after stating the facts as above, thus continued :—

In our opinion the learned Subordinate Judge was quite wrong on the former occasion in declining to decide the question of minority. Section 103 of the Transfer of Property Act clearly provides that where the party on whom notice is to be served and by whom deposit has to be accepted, or taken out of court, happens to be a person incompetent to contract, the provisions of chapter 31 of the Civil Procedure Code (corresponding to order XXXII of the new Code) shall apply. At the time when this deposit was made the new Code was in force. Order XXXII, rule 3, provides that where the defendant is a minor the court, *on being satisfied of the factum of his minority*, shall appoint the proper person to be guardian for the suit for such minor. It is obvious that if the point is in dispute the court has to be satisfied of the fact of minority, and this cannot happen unless the court inquires into the matter: *Ruckmani* v. *Veerasami* (1).

The court below has come to the conclusion that inasmuch as no guardian *ad litem* was actually appointed

(1) (1924) 47 M.L.J., 870.

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on the previous occasion by an order of the court, interest did not cease to run. Section 84 requires that the mortgagor should have done all that has to be done *by him* to enable the mortgagee to take such amount out of court. The actual appointment of a guardian *ad litem* is obviously an act done by the court and not an act which can be done by the mortgagor. Section 83 provides for the issue of a written "notice of the deposit" to be served on the mortgagee after such deposit has been made. The notice referred to in section 103 is obviously notice of such deposit as provided for by section 83. It would, therefore, seem *primâ facie* that the procedure mentioned in section 103 is consequent upon the deposit having been made and not precedent to an intention to make the deposit. On this point, however, there was a difference of opinion between two learned Judges of this Court, in the case of *Kannu Mal* v. *Indarpal Singh* (1). LINDSAY, J., following the case of *Pandurang* v. *Mahadaji* (2), held that "interest must go on running even after the date of deposit and can only stop when the appointment of a guardian has been ordered by the court and the full money is paid in." On the other hand, STUART, J., came to a contrary conclusion. Although there is much in the judgement of Mr. Justice STUART which appeals to us, it cannot be doubted that the preponderance of authority is in favour of the other view, which was accepted by another Bench when that case went up in Letters Patent appeal: *Kannu Mal* v. *Indarpal Singh* (3). A stronger case is that of *Gokul Kalwar* v. *Chandar Sekhar* (4), where under the terms of the mortgage the tender had to be made in the month of *Jeth*: the deposit was made in that month but the order appointing the guardian could not be passed until after the expiry of that period. It was then held that the deposit was defective.

(1) (1921) I.L.R., 44 All., 102.
(2) (1902) I.L.R., 27 Bom., 28
(3) (1922) I.L.R., 45 All., 273.
(4) (1926) I.L.R., 48 All.

In the present case, however, the order of the court declining to go into the question of minority and directing that the application should be consigned to the record room left nothing which could be done by the mortgagor. It might, therefore, perhaps, be possible to distinguish the present case from the reported cases cited above, but it is not necessary to decide this point finally, because in our opinion the appeal must fail on another ground.

It has been held by their Lordships of the Privy Council in the case of *Garuradhwaja Prasad* v. *Superundhwaja Prasad* (1), that according to the family custom a rule of primogeniture prevails in the family of Garuradhwaja Prasad, who was alleged by the defendants to be the father of the deceased mortgagee Mitangdhwaj Prasad, Singh. In the court below it was not disputed that the deceased mortgagee was the son of Garuradhwaja Prasad. Under these circumstances the finding of the court below that such a custom prevailed must be accepted. The learned advocate for the appellants has brought to our notice the fact that the question of the parentage of Mitangdhwaj Prasad is in dispute as against third parties and is a matter in an appeal pending in this Court. That circumstance, however, cannot be taken into account in this suit.

It is, therefore, clear that the deposit was made to the credit of Sirdhwaj Prasad Singh, who was the sole heir of the deceased mortgagee, as well as to that of his younger brother who was not a co-mortgagee and was not entitled to any share in the mortgage money. Under section 83 the deposit has to be made to the credit of the mortgagee or mortgagees. Such a deposit would obviously be invalid if the mortgagor associates with the real mortgagee some third person who is not entitled to any share in the mortgage money. Such an association would make

(1) (1900) I.L.R., 23 All., 37.

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it impossible for the real mortgagee to take out the money without the consent of this other person. Section 83 provides a special privilege to a mortgagor, and in order to claim its benefit the mortgagor must come strictly within the provisions of that section. This was the view expressed by this Court in the case of *Debendra Mohan Rai* v. *Sona Kunwar* (1). A similar view has been expressed by the Madras High Court in the case of *Madhavi Amma* v. *Kunhi Pathumma* (2). The court below has found that the mortgagors acted in good faith in assuming that both the sons were heirs to the deceased mortgagee, but the question of good faith cannot arise under section 83, when it is the duty of the mortgagor to deposit the amount to the credit of the real mortgagees. Once such questions are allowed to be raised, considerable difficulties will undoubtedly arise. No doubt in an earlier case, *Ram Sumran* v. *Sahibzada Bijai Partab Narain Singh* (3), another Bench ruled that deposit made to the credit jointly of two sets of claimants was a good deposit under the section. In view of more recent pronouncements that case appears to be of doubtful authority. It can also be distinguished in the present case on the ground that the younger brother was not a claimant to any share in the mortgage money. As a matter of fact in the court below it was conceded by his guardian that the defendant No. 1 alone succeeded to the entire estate.

Under these circumstances we are of opinion that this appeal must fail and it is hereby dismissed with costs.

Appeal dismissed.

(1) (1904) I.L.R., 26 All., 291. (2) (1899) I.L.R., 23 Mad., 510.
(3) Weekly Notes, 1885, p. 328.

Before Mr. Justice Sulaiman and Mr. Justice Kendall.

PARBATI (DEFENDANT) *v.* SARUP SINGH (PLAINTIFF).* 1928 *February*, 2.

Act No. IX of 1908 *(Indian Limitation Act), schedule I, article* 116—*Suit for damages for breach of contract in writing registered—Limitation—Contract evidenced by registered* qabuliat *only, without a* patta.

A suit for damages for breach of contract based upon a registered *qabuliat* signed by the lessee and accepted by the lessor, but no *patta* having been executed, is governed as to limitation by article 116 of the first schedule to the Indian Limitation Act, 1908. *Apaji* v. *Nilkantha* (1), *Ambalavana Pandaram* v. *Vaguran* (2), *Kotappa* v. *Vallur Zamindar* (3), *Girish Chandra Das* v. *Kunja Behari Malo* (4), *Bouwang Raja Chellaphroo Chowdhuri* v. *Banga Behari Sen* (5) and *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur* (6), referred to.

THIS was a defendant's appeal arising out of a suit brought by Sardar Sarup Singh for damages for breach of a contract. There was a contract, oral at first, between Musammat Parbati on the one hand and Sardar Tara Singh, the father of the plaintiff, on the other, under which it was agreed between the parties that Musammat Parbati would grant a lease of certain house property for six years on a certain rent. The lease money was to be payable in instalments, and nearly half of it was to be paid at the very beginning. On the 17th of March, 1918, Musammat Parbati executed a receipt for a sum of Rs. 3,300, acknowledging that she had received that amount on account of lease money in respect of the houses and the shops for the period mentioned. On the next day, viz., the 18th of March, 1918, Sardar Tara Singh executed a document called a *thekanama*, which was really a *qabuliat* or the counterpart of a lease,

* First Appeal No. 57 of 1925, from a decree of Joti Sarup, Second Subordinate Judge of Saharanpur, dated the 7th of January, 1925.

(1) (1901) 3 Bom. L.R., 667. (2) (1895) I.L.R., 19 Mad., 52.
(3) (1901) I.L.R., 25 Mad., 50. (4) (1908) I.L.R., 35 Calc., 683.
(5) (1915) 20 C.W.N., 408. (6) (1916) I.L.R., 44 Calc., 759.

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under which he undertook to take the property on lease on the conditions mentioned above. This document was duly registered. On behalf of the defendant it was urged that as a matter of fact only Rs. 2,950 had been paid in cash and the balance of Rs. 350 remained outstanding, though a receipt was given for the whole amount, and that it was on account of the failure to pay the balance that the defendant did not execute the *patta*. It was further pleaded that the claim was barred by the three years' rule of limitation.

The court of first instance held that the full amount of Rs. 3,300 had been paid when the receipt was executed. It was further of opinion that the breach was committed by the defendant, particularly as the payment of Rs. 350 had been made. It also found that the claim was not barred by limitation, but was saved by the provisions of article 116 of the Indian Limitation Act.

The plaintiff's suit was accordingly decreed, and the defendant appealed.

Mr. *Nihal Chand*, Dr. *Surendra Nath Sen* and Mr. *B. Malik*, for the appellant.

Sir *Tej Bahadur Sapru* and Babu *Harendra Krishna Mukerji*, for the respondent.

The judgement of the Court (SULAIMAN and KENDALL, JJ.), after setting forth the facts as above, thus continued :—

As regards the question of fact which was in dispute in this case, we are in agreement with the learned Subordinate Judge that the Rs. 350 had been paid. Even if it had not been paid in time, the time of its payment not being of the essence of the contract, there would be no breach committed on the part of the plaintiff so as to entitle the defendant to avoid the contract. The execution of the *patta* by Musammat Parbati was entirely

a matter within her power, and if she wanted to perform her part of the contract, there could possibly be no obstacle in her way. Under these circumstances the breach was undoubtedly committed by the appellant.

The only question, and by no means an easy one, which remains for decision is whether the claim was barred by limitation. It is wholly unnecessary in this case to consider the question whether the transaction of lease can be validly completed by the execution and registration of a *qabuliat* without any registered *patta*. On this point there has been a conflict of opinion between this High Court and the other High Courts. We have not to consider the question whether any complete conveyance took place or not. We have only to consider whether there was a contract for the grant of a lease and whether that contract has been broken. That there was a contract and there has been a breach cannot now be disputed. The only question is whether the present suit can be described as a suit for compensation for breach of a contract in writing registered, within the meaning of article 116 of the Indian Limitation Act. The learned advocate for the appellant contends in the first place that the terms of the *qabuliat* do not show any undertaking on the part of Musammat Parbati, and therefore the document does not embody any complete contract which has been broken. It is obviously the document which was intended to be executed by the lessee, and the language is only in the first person. But there can be no doubt that it embodies all the terms of the lease and the conditions under which it was to be taken by the lessee and granted by the lessor. We are therefore unable to hold that the complete terms of the contract of lease are not embodied in this document.

The next contention is that it cannot be said to be a contract in writing registered, when it is purely a unilateral instrument. It is contended that unless there

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is a mutual consent, there cannot be any agreement and consequently there cannot be any contract and that therefore the present suit is not based on the breach of a contract in writing registered and that the cause of action does not arise out of any registered contract. In support of this contention reference has been made to the case of *Apaji* v. *Nilkantha* (1) where the learned CHIEF JUSTICE expressed the view that the words "contract in writing" contemplate an agreement in writing signed by both the parties affected thereby, and that an agreement signed only by one of the parties does not satisfy the requirements of the law unless the assent of the other party appears in any way from the agreement itself. If the article were to be taken in its strict literal sense, there might be considerable force in this interpretation. On the other hand the view which prevails in Madras and Calcutta is that there is no justification for introducing into the article words like "executed by both parties" or "executed by the person sued against": *Ambalavana Pandaram* v. *Vaguran* (2), *Kotappa* v. *Vallur Zamindar* (3), *Girish Chandra Das* v. *Kunja Behari Malo* (4) and *Bouwang Raja Chellaphroo Chowdhuri* v. *Banga Behari Sen* (5). It seems to us impossible to hold that words like "executed by both parties" are deemed to be understood in this article. In India, where a large number of documents are executed by only one party and not the other, and where indentures signed by both parties are not common, it would cause great hardship if we were to interpret this article as applicable only to cases where both parties have signed the same document. In that view the article would also become wholly inapplicable to cases of registered sale-deeds, registered mortgage-deeds and registered bonds and agreements which are signed by only one party. We are also of opinion that there is no

(1) (1901) 3 Bom. L.R., 667.
(2) (1895) I.L.R., 19 Mad., 52.
(3) (1901) I.L.R., 25 Mad., 50.
(4) (1908) I.L.R., 35 Calc., 683.
(5) (1915) 20 C.W.N., 408.

justification for limiting this article to the case where the registered document is signed by the defendant only. The article does not contain those words and there is no reason why those words should be interpolated. If there is a valid contract evidenced by a registered document which, though signed by only one party, is complete because it has been accepted by the other, and breach of that contract has been committed, it seems to us that article 116 would be equally applicable to such a case. The Madras and Calcutta cases cited above were cases where the registered contract was signed by only one party and two of those cases were actually cases of a registered *qabuliat* without the *patta*. The courts held that article 116 was applicable. No case holding the contrary view has been cited before us. We have already pointed out that cases in which the question is whether the transaction of a lease is complete by the execution and registration of only the *qabuliat* are not cases which are directly in point.

In another case, viz., *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur* (1), their Lordships of the Privy Council had to consider whether a suit brought for recovery of rent under a registered *qabuliat* was governed by article 116 or not. That was a case where a *patta* was executed, though it is not quite clear from the judgement or the report whether that *patta* was registered. The *qabuliat*, however, was undoubtedly registered and the suit was brought on the basis of that registered *qabuliat*. Their Lordships laid down that in view of a series of decisions all one way it must be held that article 116 was applicable and that breach of a contract in writing registered had been committed by non-payment of rent. That case may not be directly in point, but it does show that their Lordships took a liberal view of article 116 and applied it, although there was article 110

(1) (1916) I.L.R., 44 Calc., 759.

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which specially refers to suits for arrears of rent. Having regard to this state of the authorities, we are of opinion that the view taken by the learned Subordinate Judge that the claim was not barred by limitation but was governed by the six years' rule of limitation as laid down in article 116 was correct.

The result, therefore, is that this appeal is dismissed with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

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February, 9.

Before Mr. Justice Dalal.

EMPEROR *v.* SHEO JANGAL PRASAD.*

Criminal Procedure Code, sections 118, 121 *and* 514—*Security for good behaviour—Bond executed with sureties—Circumstances in which the surety's bond can be declared forfeited—Act No. XLV of* 1860 *(Indian Penal Code), section* 172—*Absconding to avoid a warrant of arrest.*

Absconding to avoid arrest under a warrant is not an offence within the meaning of section 172 of the Indian Penal Code, nor is it one of the offences specified in section 121 of the Code of Criminal Procedure, for the commission of which alone can a surety's bond be forfeited. *Udham Singh* v. *King-Emperor* (1), dissented from. *Queen* v. *Womesh Chunder Ghose* (2), *Majhi Mamud* v. *Emperor* (3), *Queen* v. *Zahoor Ali* (4) and *Queen* v. *Amir Jan* (5), followed.

THIS was a reference by the Sessions Judge of Mirzapur in a case where a surety's bond had been declared forfeited under the provisions of section 514 of the Code of Criminal Procedure. The facts of the case are fully stated in the order of the Court.

Mr. *T. A. K. Sherwani,* for the applicant.

*Criminal Reference No. 832 of 1927.

(1) (1913) Vol. 48 P.R. (Cr. J.), No. 15.
(2) (1866) 5 W.R., (Cr. R.), 71.
(3) (1905) 2 C.L.J., 625.
(4) (1872) 4 N.-W.P., H.C.R., 97.
(5) (1875) 7 N.-W.P.H.C.R., 302.

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The Assistant Government Advocate (Dr. *M. Wali-ullah*), for the Crown.

DALAL, J.—The question of law raised in these proceedings is of much interest. One Dharamdhuja was directed by a Magistrate, under section 118 of the Code of Criminal Procedure, to execute a bond with two sureties to be of good behaviour for a period of three years. The applicant, Sheo Jangal Prasad, was one of the sureties. The surety in such a case binds himself to forfeit a certain sum of money (Rs. 1,500 in this case) in case of the person called upon to give the bond making default therein (see Form No. 11 of the Criminal Procedure Code). What constitutes breach of the bond is laid down in section 121 of the Criminal Procedure Code. The provisions are that the commission or attempt to commit or the abetment of any offence punishable with imprisonment, wherever it may be committed, is a breach of the bond. The Magistrate took proceedings against Sheo Jangal under section 514 and ordered the forfeiture of his surety bond. The Magistrate was of opinion that Dharamdhuja had committed murder. Dharamdhuja was never put on his trial, after his appearance in court, for the commission of any offence and the finding of the Magistrate therefore cannot possibly be upheld that Dharamdhuja had committed murder. On appeal to the District Magistrate, he was of opinion that Dharamdhuja was guilty of defying lawful orders of arrest for months. He did not state in his order of the 23rd of August under what section of the Indian Penal Code that offence fell. On revision the Sessions Judge of Mirzapur was of opinion that Dharamdhuja should first be convicted of an offence before proceedings could be taken against Sheo Jangal under section 514 of the Code of Criminal Procedure. In reply the District Magistrate gives it as his opinion that the provisions of section 121 are not exhaustive. I cannot agree with that

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opinion. When the law definitely lays down what would constitute a breach of the bond given under an order passed under section 118 of the Code of Criminal Procedure, the breach must be confined to those acts and cannot be extended to the commission of any other acts. The bond can only be forfeited if the person bound over commits, attempts to commit or abets any offence punishable with imprisonment. At the same time I do not agree with the learned Judge that there should first of all be a conviction of the person bound over, before the surety can be proceeded against. If in the proceedings taken against a surety it is proved that the person bound over had committed an offence, that would be sufficient to lead to a forfeiture of the bond. The learned Judge referred to the provisions of section 514(7) and to the wording of the notice to the surety of forfeiture of bond for good behaviour (Form No. 46). These are, however, matters of procedure and evidence. If the person bound over happens to be convicted before proceedings are taken against the surety, reference should be made in the notice and a certified copy of the judgement may be used as evidence in proceedings under section 514 of the Code of Criminal Procedure against the surety. It is nowhere laid down in the Code that the person giving the bond should actually be convicted before proceedings are taken against his surety.

The question to decide, therefore, is whether Dharamdhuja has committed any offence. I hold that it is not proved so far that he has committed the offence of murder. During the course of argument I expressed the opinion to his counsel that he had committed an offence under section 172 of the Indian Penal Code. Dr. *Waliullah*, the Assistant Government Advocate, has studied the record and has pointed out to me the evidence in proof of Dharamdhuja absconding in order to avoid being served with a warrant of arrest. That evidence

is satisfactory and there can be no doubt that he was absconding to avoid arrest. The learned counsel for the applicant referred to a criminal judgement of the Punjab Court, *Udham Singh* v. *King-Emperor* (1). The learned Judge in that case was of opinion that a person who stands surety for another undertakes liability for such good conduct only, on the part of the person for whom he stood surety, as is indicated by the circumstances under which the security was demanded, that is, the subsequent conviction should be of an offence *ejusdem generis*. In the present case Dharamdhuja being bound over as he was considered to be a habitual thief and robber, the offence committed by him should be of theft or robbery before proceedings could be taken against his surety. I do not accept this view. Section 121 makes no such reservation and lays down that breach of the bond is committed as soon as a person bound over commits any offence punishable with imprisonment. The other argument, however, which is raised by the learned counsel cannot be met. The provisions of section 172 do not cover the absconding from a warrant of arrest. As far back as 1866 it was laid down by a majority of a Full Bench of the Calcutta High Court that a warrant addressed to a police officer to apprehend an offender and to bring him before the Magistrate is not a summons, notice or order within the meaning of section 172 of the Indian Penal Code, and that the offence of absconding by an offender against whom a warrant has been issued is not punishable under that section : *Queen* v. *Womesh Chunder Ghose* (2). This was followed by a Bench of two Judges in 1905 in the Calcutta High Court, in *Majhi Mamud* v. *Emperor* (3). There are two rulings of this High Court, also, of 1872 and 1875 to the same effect : This view is reasonable, because different provi- *Queen* v. *Zahoor Ali* (4) and *Queen* v. *Amir Jan* (5).

(1) (1913) Vol. 48 P.R., (Cr. J.), No. 15.
(2) (1866) 5 W.R., (Cr. R.), 71.
(3) (1905) 2 C.L.J., 625.
(4) (1872) 4 N.-W.P., H.C.R., 97
(5) (1875) 7 N.-W.P., H.C.R., 302.

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sions are enacted under the Code of Criminal Procedure and of a very stringent character, to meet the case of an absconder from a warrant of arrest. When an accused person absconds from a warrant, a proclamation is issued under section 87 and, subsequently, attachment of property under section 88 and the placing of the property at the disposal of Government under clause (7) of section 88. For these reasons I hold that Dharamdhuja did not commit an offence under section 172. As Dharamdhuja is not proved to have committed any offence, there was no breach of his bond, and consequently no breach of the bond given by his surety. I set aside the order of forfeiture passed by the Magistrate on the 4th of July, 1927, and direct that if any sum has been recovered from Sheo Jangal Prasad it shall be refunded to him.

Order set aside.

APPELLATE CIVIL.

Before Mr. Justice Boys and Mr. Justice Iqbal Ahmad.

1928 *February*, 10.

MOHSIN RAZA KHAN AND OTHERS (JUDGEMENT-DEBTORS) *v.* HAIDAR BAKHSH (DECREE-HOLDER).*

Act No. IX of 1908 (*Indian Limitation Act*), *schedule I, article* 182—*Execution of decree—Purchase by decree-holder—Application by decree-holder* quâ *auction-purchaser for possession—Step in aid of execution—Limitation—Civil Procedure Code, order XXI, rule* 95.

Held that an application under order XXI, rule 95, of the Code of Civil Procedure by an auction-purchaser to recover possession of the property purchased cannot be counted as a proceeding in execution and a step in aid of execution by reason of the fact that the auction-purchaser happens to be also the decree-holder. *Bhagwati* v. *Banwari Lal* (1),

*Second Appeal No. 668 of 1927, from a decree of J. Allsop, District Judge of Aligarh, dated the 22nd of February, 1927, reversing a decree of Phul Chand Mogha, Subordinate Judge of Aligarh, dated the 27th of November, 1926.

(1) (1908) I.L.R., 31 All., 82.

followed. *Babu Ram* v. *Piari Lal* (1) and *Moti Lal* v. *Makund Singh* (2), referred to.

THE facts of the case are fully set forth in the judgement of the Court.

Mr. *A. M. Khwaja*, for the appellants.

Maulvi *Muhammad Abdul Aziz*, for the respondent.

BOYS and IQBAL AHMAD, JJ. :—This is a judgement-debtors' appeal arising out of the following circumstances. Two brothers, Ali Raza and Hasan Raza, agreed to divide their property. They had each of them incurred certain debts, and it was agreed between them that each should be responsible for discharging the debts incurred by him. The property allotted to Hasan Raza was subject to a mortgage created by Ali Raza, and this mortgage Ali Raza failed to discharge. Hasan Raza transferred his property by sale to Ismail, who paid off the mortgage, and then proceeded to sue Ali Raza. In due course he got his decree, in which was included half a *chabutra*. It may be as well to explain immediately here the nature of this *chabutra*. The northern portion of the *chabutra* was open to the air. On the southern portion there was a verandah. The *chabutra* was divided into half at the partition by a line running north and south. This left a portion of the open *chabutra* and a portion of the *chabutra* covered by the verandah to each of the brothers. The eastern half fell to Ali Raza, and the dispute has arisen out of the question whether when Ismail got his decree it covered the south-eastern portion of the *chabutra* covered by the *verandah* as well as the north-eastern portion of the *chabutra* which was open to the air. After obtaining his decree Ismail sold it to Haidar Bakhsh, the present respondent. We are not concerned with the next proceedings till we come to the 24th of May, 1923, when Haidar Bakhsh filed his second application for execution. The ensuing sale took

(1) (1919) I.L.R., 41 All., 479. (2) (1897) I.L.R., 19 All., 477.

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place on the 8th of July, 1923, when the decree-holder himself purchased. The whole decree was not thereby satisfied. On the 12th of September, 1923, Haidar Bakhsh who, though he was the decree-holder, must, in our view, be held to have been acting in his capacity as auction-purchaser, applied for possession under order XXI, rule 95, and on the 10th of October, 1923, got possession over half the *chabutra*. We have no information as to when or how trouble began to arise in regard to the south-eastern portion of the *chabutra* which was covered by the *verandah*, except such as we can obtain from the file of a suit which Haidar Bakhsh proceeded to institute. On the 19th of December, 1925, Haidar Bakhsh filed a suit against one Mohsin Raza, son of Hasan Raza, who also happened to be heir of Ali Raza. In that suit he asked for an injunction to restrain the defendant, the heir of Ali Raza, from using the south-eastern portion of the *chabutra* covered by the *verandah*. He also asked for the closing of a door on the south side of the *chabutra* through which the defendant used to come on to the south-eastern portion of the *verandah*. The date of the alleged cause of action was given as the 1st of December, 1925. The trial court gave Haidar Bakhsh an injunction restraining the defendant from using the door for going on to either the northern or the southern portions of the *chabutra* which, including the *verandah* portion, it held to belong to the plaintiff. On the 24th of June, 1926, the lower appellate court modified this decree and restricted the injunction against the defendant to restraining their use of the north-eastern or open portion of the half *chabutra*, and held that the south-eastern *verandah*-covered portion of the half *chabutra* belonged to the defendant, and was not included in the auction sale of Haidar Bakhsh. From that decision a second appeal, No. 1533 of 1926, is at present pending in this Court.

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The suit, of which we have just given the particulars, having ended in a decision that Haidar Bakhsh had not bought the south-eastern *verandah* portion of the *chabutra*, he next proceeded on the 16th of July, 1926, to apply for the sale of that portion of the *chabutra* to satisfy the balance of the decree still owing to him. It is out of this application that the present proceedings have arisen. The application as drafted covered the whole of the half *chabutra* which had been allotted to Ali Raza, whether open or *verandah*-covered, but it was admitted before the execution court that the application must be restricted, in view of prior proceedings, to the *verandah* portion at the south-east. The judgement-debtor promptly filed objections, one of which was based on the plea of limitation. For the decree-holder it was urged that his application was not barred by limitation, and he relied upon the decision in *Moti Lal* v. *Makund Singh* (1). The learned Subordinate Judge repelled this contention, holding that that decision had been overruled by the decision of a majority of the Full Bench reported in *Bhagwati* v. *Banwari Lal* (2), and, holding the application to be barred by limitation, he dismissed it. The lower appellate court's attention was drawn to the later decision in *Babu Ram* v. *Piari Lal* (3) and the court somewhat reluctantly held itself bound by the later decision, and holding that there was no bar of limitation returned the case to the Subordinate Judge to proceed with the execution. The judgement-debtor has come in second appeal to this Court, and the sole question which really finally calls for our decision is whether we are prepared to accept and follow the decision of two Judges in *Babu Ram* v. *Piari Lal* (3), and which followed the decision in *Moti Lal* v. *Makund Singh* (1), or whether we hold that we are bound by the decision of the majority of the Judges in *Bhagwati* v. *Banwari Lal* (2).

(1) (1897) I.L.R., 19 All., 477. (2) (1908) I.L.R., 31 All., 82.
(3) (1919) I.L.R., 41 All., 479.

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An application for execution was made, as we have stated above, on the 24th of May, 1923. The present application is dated the 16th of July, 1926, and it is, therefore, clear that that application is barred by limitation unless something intervened between those two dates to save the period running. For the decree-holder it is contended that the expiry of the period of limitation is saved by the application which was made on the 12th of September, 1923, under order XXI, rule 95, by Haidar Bakhsh, who at that time enjoyed the dual capacities of decree-holder and auction-purchaser. The question, then, really arises whether an application under order XXI, rule 95, by an auction-purchaser to recover possession is a proceeding in execution and a step in aid of execution when such application is made by the decree-holder, who is also the auction-purchaser. It was held in the case of *Babu Ram* v. *Piari Lal* (1), which was followed by the lower appellate court in this case, that such a proceeding was a proceeding in execution and sufficed to save limitation. As we do not ourselves see any adequate reason for departing from, or suggesting another Full Bench in regard to the decision in *Bhagwati* v. *Banwari Lal* (2), it is necessary to examine the other two cases to which we have referred with some care. As regards the later case, *Babu Ram* v. *Piari Lal*, it is only necessary to state that the learned Judges simply followed the decision in *Moti Lal* v. *Makund Singh* (3). They disposed of the decision in *Bhagwati* v. *Banwari Lal* with the single observation that the question for decision in that case was altogether different. Nothing further is set out in that judgement to indicate in what respect the decision in *Bhagwati* v. *Banwari Lal* differed from that then before the Court. We have, therefore, had to again examine that well-known decision. The case referred to the Full Bench

(1) (1919) I.L.R., 41 All., 479. (2) (1908) I.L.R., 31 All., 82.
(3) (1897) I.L.R., 19 All., 477.

does not appear to have been set out anywhere in the report in so many words; but the question very clearly was whether, when an auction-purchaser, who happens to be also the decree-holder, desires to recover possession from a judgement-debtor, the question is one which falls within the scope of section 47 of the Code of Civil Procedure or not. The auction-purchaser had in fact filed a suit, and the majority of three Judges out of the five held that the suit did lie. The most full judgement of the three Judges, and one which was fully adopted by the other two, was that of Mr. Justice BANERJI; and it is apparent from a consideration of that judgement that the three Judges held that the suit did lie and was not barred by section 47 for two reasons: that, in the first place, the question between the auction-purchaser and the judgement-debtor was not a question arising between the parties to the suit or their representatives inasmuch as the auction-purchaser was not the representative of the decree-holder, but of the judgement-debtor, and therefore the question had really only arisen between the judgement-debtor and his own representative. But the second reason for which section 47 was held to be inapplicable, and which, as it appears to us, is directly in point to the present case, is that such a proceeding as that in question, and in question in this case and in question in *Babu Ram* v. *Piari Lal* (1), was not one in relation to execution. That opinion is expressed at length and after much consideration of the authorities at page 100 of the report. In view of the remarks in *Babu Ram* v. *Piari Lal*, we have examined the opinion of the Full Bench and the facts of that case to discover, if possible, where the suggested difference lay, and we have been unable to trace any such difference.

To turn next to the case of *Moti Lal* v. *Makund Singh* (2). In that case it was held that an application

(1) (1919) I.L.R., 41 All., 479. (2) (1897) I.L.R., 19 All., 477.

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by a decree-holder to be paid the proceeds of the sale is a step in aid of the execution, and, by analogy with that proposition, the learned Judges proceeded to say that they could see no difference between a decree-holder applying for his money and the case where he is himself the auction-purchaser and applies for the property which represents the money. This is a view which we do not feel ourselves able to accept. It appears that in this, and in all other such cases, it can make, broadly speaking, no difference to the auction-purchaser's rights or liabilities that he also happens to be the decree-holder, and no difference to the rights and liabilities of a decree-holder that he also happens to be the auction-purchaser. We have limited the above proposition by the word "broadly", for there may conceivably be some rare cases in which the rights or liabilities might be affected by the fact that the two characters are borne by the same person. One instance naturally suggests itself. If circumstances should arise in which there was a question of whether the decree-holder had knowledge of some act of the auction-purchaser or *vice versâ*, it is clear that where both characters are borne by the same person such knowledge could be presumed. But as we have said, broadly speaking, we hold that the fact that the decree-holder and auction-purchaser are one and the same person can have no bearing on the rights and liabilities attaching to a decree-holder as such, and the rights and liabilities attaching to an auction-purchaser as such. In a case therefore where the decree-holder is himself an auction-purchaser and the sale has been confirmed and a sale-certificate granted, we think that the decree-holder must be taken to have received from himself as auction-purchaser the sale-price, and that it is as auction-purchaser and as auction-purchaser alone that he can proceed to make an application, if necessary, under order XXI, rule 95. We are, therefore, of opinion that there is no adequate reason for distinguishing the decision of

the majority of the Judges in *Bhagwati* v. *Banwari Lal* (1), and further, as we are agreeing entirely with the view expressed on the point before us in that case, we see no reason for suggesting a reference to another Full Bench.

The result is that we hold that the plea of the judgement-debtor that the application of the 16th of July, 1926, was barred by limitation was a good plea and ought to be given effect to.

Before disposing of the appeal we may note another point taken before us on behalf of the decree-holder. He urged that he was entitled to an extension of time by virtue of the provisions of section 14 (2) of the Limitation Act. There is, in our view, absolutely no force in this contention. Counsel desired to refer us to some reported decision, but we do not consider it necessary to discuss that or any other ruling by which we are not bound, in view of the plain terms of section 14(2) and of the admission that counsel himself has to make that there is no force in his contention if the ordinary meaning be given to the very ordinary language used in that section. The relief claimed in the proceeding, of which it is desired to take advantage, must be the same relief as is asked for in the proceeding in regard to which limitation is being considered. Here manifestly, and it had to be immediately admitted, the relief sought by the application for execution was for a sale to satisfy the balance of a decree. The reliefs sought for in the suit to which we have referred have been mentioned when speaking of that suit. They were manifestly wholly different. There are possibly other reasons also why section 14 can have no application, but we need not further discuss it. Finally, counsel referred to article 181 of the Limitation Act. But it could not seriously be pressed that article 182 was not the appropriate article.

(1) (1908) I.L.R., 31 All., 82.

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The result is that, allowing the appeal, we set aside the decree of the lower appellate court and restore that of the court of first instance dismissing the application for execution. The appellant will have his costs throughout.

Appeal allowed.

Before Mr. Justice Sulaiman and Mr. Justice Kendall.

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DEOKI (DEFENDANT) *v.* JWALA PRASAD (PLAINTIFF).*

Hindu law—Hindu widow—Suit for declaration by next male reversioner—Nearer female heir in existence—Effect of omission to implead the nearer reversionary heir—Act No. I of 1877 *(Specific Relief Act), section* 42.

Plaintiff, alleging himself to be the nearest reversionary heir of her husband, brought a suit against a Hindu widow asking, first, for a declaration of his status as presumptive reversionary heir, and, secondly, for a declaration that a will alleged to have been executed by the husband shortly before his death was a forgery.

At the time of suit there was in existence a nearer heir in the shape of a minor daughter of the defendant, who lived with her, but she was not made a party to the suit.

Held (1) that as regards the first relief sought the suit was not maintainable;

(2) that, as regards the second relief, although it is not correct to say that the existence of a nearer female heir can always be ignored by the next male reversioner, yet, even without any express proof of refusal, concurrence or collusion on her part, the court may exercise its discretion and grant the declaratory relief to the male reversioner, and without insisting upon the female heir being joined in the suit, provided that such a course is not prejudicial to her interests.

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*First Appeal No. 266 of 1925, from a decree of Mirza Nadir Husain, Second Additional Subordinate Judge of Aligarh, dated the 6th of March, 1925.

Rani Anand Kunwar v. *The Court of Wards* (1), *Madari* v. *Malki* (2), *Balgobind* v. *Ram Kumar* (3), *Ishwar Narain* v. *Janki* (4), *Hanuman Pandit* v. *Joti Kunwar* (5), *Raja Dei* v. *Umed Singh* (6), *Lakhpati* v. *Rambodh Singh* (7), *Ramyad* v. *Rambihara* (8), *Venkatanarayan Pillai* v. *Subbammal* (9) and *Kesho Prasad Singh* v. *Sheo Pargash Ojha* (10), referred to.

THIS was a defendant's appeal arising out of a suit for a declaration that the plaintiff was the next male heir of the deceased Hoti Lal and that a will set up by his widow Musammat Deoki in her favour, alleged to have been executed on the 28th of October, 1922, was a false and spurious document. The deceased Hoti Lal had left a daughter Musammat Prembati, who would succeed to the estate if her mother were to die, but the plaintiff did not implead her. She was in fact an unmarried minor girl of tender years and was under the protection of her mother.

The claim was mainly contested by the widow, Musammat Deoki, who pleaded that the deceased had one day before his death executed an unregistered will in her favour conferring upon her an absolute estate. The property in dispute consisted of a one-sixth share in two markets and a one-third share in two residential houses. The defendant further pleaded that the plaintiff was not the next immediate reversioner and was not entitled to maintain the suit for declaration.

The first court decreed the claim by granting the plaintiff a declaration that the alleged will set up by the widow was a forged document. The defendant appealed to the High Court, and on her behalf both the right of the plaintiff to maintain the suit and the finding of the court below as regards the spuriousness of the will were challenged.

(1) (1880) I.L.R., 6 Calc., 764.
(2) (1884) I.L.R., 6 All., 428.
(3) (1884) I.L.R., 6 All., 431.
(4) (1893) I.L.R., 15 All., 132.
(5) Weekly Notes, 1908, p. 207.
(6) (1912) I.L.R., 34 All., 207.
(7) (1915) I.L.R., 37 All., 350.
(8) (1919) 4 Pat. L.J., 734.
(9) (1915) I.L.R., 38 Mad., 406.
(10) (1921) I.L.R., 44 All., 19.

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Munshi *Panna Lal*, for the appellant.

Dr. *Kailas Nath Katju*, for the respondent.

The judgement of the Court (SULAIMAN and KENDALL, JJ.), after setting out the facts as above, thus continued :—

As regards the relief that the plaintiff would be the next male heir, it is now well settled that a mere presumptive reversionary heir, who has a mere possibility of succession or *spes successionis* upon the death of a Hindu widow, is not entitled to maintain a suit for a declaration of his so-called reversionary right. A reversioner as such cannot, under section 42 of the Specific Relief Act, claim to be entitled to any legal character or any right to any property. Even assuming that the word "right" may include rights present, future, vested or contingent, such a declaration would be refused as it would be premature. As the actual succession will depend upon the state of things existing when the widow dies, it is impossible to predicate at this moment who would be the reversionary heir of the deceased full proprietor. The declaration sought therefore is futile and must be refused. Indeed the learned advocate for the appellant has conceded that such a declaration cannot be granted.

The next question is whether in the presence of Musammat Prembati, the daughter, who would succeed immediately if the widow were to die, the present plaintiff, who is the male reversionary heir, is entitled to maintain the suit. In the leading case of *Rani Anand Kunwar* v. *The Court of Wards* (1), their Lordships of the Privy Council laid down the general rule that a declaratory suit

> "must be brought by the presumptive reversionary heir,—that is to say, by the person who would succeed if the widow were to die at that moment. Such a suit may be brought by a more distant reversioner if those nearer in succession are in collusion with the widow, or have precluded themselves

(1) (1880) I.L.R., 6 Calc., 764 (772).

from interfering." " If the nearest reversionary heir refuses, without sufficient cause, to institute proceedings, or if he has precluded himself by his own act or conduct from suing, or has colluded with the widow, or concurred in the act alleged to be wrongful, the next presumable reversioner would be entitled to sue. In such a case . . . . . the court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue, and would probably require the nearer reversioner to be made a party to the suit."

Following this case it was held in *Madari* v. *Malki* (1), that without proof of any connivance or collusion between a Hindu widow and her daughters, a collateral reversioner was not entitled to maintain such a suit. On the other hand, another Bench held, in *Balgobind* v. *Ram Kumar* (2), that "the existence of female heirs, whose right of succession cannot surpass a widow's estate, does not affect the suit of the nearest presumptive reversionary heir to the full ownership of the estate, and that such presumptive heir can maintain a suit for declaratory relief . . . . . irrespective of the question of collusion or concurrence by such female heirs." The former Allahabad case was followed in *Ishwar Narain* v. *Janki* (3). The latter case was approved of in *Hanuman Pandit* v. *Joti Kunwar* (4) and in *Raja Dei* v. *Umed Singh* (5), where it was held that "a remote reversioner presumptively entitled to the full ownership of the property can maintain such a suit as this, where the immediate reversioner is a female, who will take, if anything, a limited or life estate only, her existence offering no bar to the maintenance of the suit." It was pointed out in this last-mentioned judgement that the Madras, Calcutta and Oudh Courts had taken the same view of the Privy Council case. The same principle was accepted in *Lakhpati* v. *Rambodh Singh* (6). The Patna High

(1) (1884) I.L.R., 6 All., 428.
(2) (1884) I.L.R., 6 All., 431.
(3) (1893) I.L.R., 15 All., 132.
(4) Weekly Notes, 1908, p. 207.
(5) (1912) I.L.R., 34 All., 207.
(6) (1915) I.L.R., 37 All., 350 (352).

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Court also has taken the same view in *Ramyad* v. *Rambihara* (1). There is thus a clear preponderance of authority in favour of the view that a reversioner to the full proprietary estate is entitled to maintain a suit without showing collusion between the nearer female heir and the widow, and that the principle laid down by their Lordships of the Privy Council has no application where the next heir is a female and as such entitled only to a life-estate. But with great respect we would point out that all the learned Judges have ignored the significance of the definition of the words " presumptive reversionary heir " as given by their Lordships themselves, and have introduced the words " to the full proprietary interest", which are not to be found in that definition. In *Rani Anand Kunwar's* case (2) their Lordships at page 772 stated " . . . . . must be brought by the presumptive reversionary heir,—that is to say, by the person *who would succeed if the widow were to die at that moment.*" When there is a nearer female heir intervening, it cannot be said by any stretch of the language that the next male heir is the person who would succeed if the widow were to die at that moment. In face of this clear language we are unable to agree that the words " reversionary heir " used by their Lordships meant only " reversionary heir to the full proprietary interest " and did not include the female heir who would succeed immediately if the widow were to die at that moment. Although there have been expressions of the contrary view by so many eminent Judges, we feel it our duty to give effect to the clear language used by their Lordships and hold that the general rule laid down in *Rani Anand Kunwar's* case is not inapplicable to the case where a nearer female heir intervenes, provided that she would be the heir to the estate if the widow were to die at that moment. The rule that the next immediate reversioner should have the right of suit in the first

(1) (1919) 4 Pat. L.J., 734. (2) (1880) I.L.R., 6 Calc., 764.

instance has been re-affirmed by their Lordships of the Privy Council in the case of *Venkatanarayan* v. *Subbammal* (1). There it was held that

"a suit by the presumptive reversioner is a representative suit on behalf of the general body of reversioners, and on the death of the presumptive reversioner the next presumable reversioner is entitled to continue the action. The right to relief on the part of reversioners exists severally in order of succession and arises out of the one and the same transaction impugned as invalid and not binding against them as a body."

Can a suit brought by a daughter be thrown out on the ground that she is not presumptive reversioner as contemplated by their Lordships?

At the same time we fully appreciate the difficulties which might arise if the courts were to insist on strict proof of collusion, concurrence or carelessness on the part of the next female heir, for in many cases such strict proof may not be forthcoming, and lapse of time may make available evidence disappear. But in our opinion the solution of the difficulty does not lie in saying that the general rule laid down by their Lordships of the Privy Council is inapplicable where a female heir intervenes, but in recognizing that the instances mentioned by their Lordships, when the next presumable reversioner can sue, were not intended to be absolutely exhaustive. Their Lordships remarked at page 772 :— "In such case, upon a plaint stating the circumstances under which the more distant reversionary heir claims to sue, the court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue, and would probably require the nearer reversioner to be made a party to the suit." It follows that although we are unable to hold that the existence of a nearer female heir can always be ignored by the next male heir, we are prepared to concede that even without any express proof of refusal, concurrence or collusion on her part there

(1) (1915) I.L.R., 38 Mad., 406.

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may be special circumstances in which a court may exercise its discretion and grant the declaratory relief to a remoter heir.

Another serious difficulty in the way of the plaintiff is caused by the unfortunate omission to implead Musammat Prembati. The learned advocate for the plaintiff replies and says that once the right of the remoter reversioner to sue is established, there is no rule which requires that the nearer heir should be impleaded. He has brought to our notice that at least in some cases of the Allahabad High Court the nearest female heir had not been impleaded and nevertheless the declaration was granted. In *Balgobind's* case (1) the existence of the daughter Musammat Phulera was discovered only at the trial and made certain after the finding of the first court that she was still alive. Similarly in *Lakhpati's* case (2), Sarju Dei, alleged to be the legitimate daughter of Jita, was not a party and the case proceeded on the assumption that her presence, even if she was legitimate, would not prevent the plaintiff from suing.

In *Rani Anand Kunwar's* case, on top of page 773 their Lordships remarked "the court . . . . . would probably require the nearer reversioner to be made a party to the suit." Again in *Venkatanarayan* v. *Subbammal* (3) their Lordships said: "There is nothing to preclude a remote reversioner from joining or asking to be joined in the action brought by the presumptive reversioner or even obtaining the conduct of the suit on proof of laches on the part of the plaintiff or collusion between him and the widow or other female whose acts are impugned." This undoubtedly recognizes more than one reversioner being a party to the suit. Similarly one of us, in the case of *Kesho Prasad Singh* v. *Sheo Pargash Ojha* (4), referred to the propriety of impleading other reversioners to a representative suit. As the relief to be granted is a discretionary relief, it cannot be urged

(1) (1884) I.L.R., 6 All., 431.
(2) (1915) I.L.R., 37 All., 350.
(3) (1915) I.L.R., 38 Mad., 406.
(4) (1921) I.L.R., 44 All., 19.

that the non-joinder of the nearest reversioner is, by virtue of order I, rule 9, of no consequence even when she may be prejudiced adversely by the result of the suit. All the same, a suit cannot fail merely on the technical ground that she has not been impleaded, although the relief to be granted is really to her benefit.

We accordingly propose to consider the case on its merits and postpone the consideration of the question whether we should or should not exercise our discretion in granting the declaration till we have examined whether the finding of the court below as regards the disputed will is or is not correct.

[Their Lordships discussed the evidence and continued.]

Having regard to all these circumstances we are of opinion that the finding of the court below that the will has not been proved to be genuine cannot be disturbed in appeal.

If the will is declared to be a forged document the result will be that the absolute estate does not devolve on the widow, but she only gets a Hindu widow's estate. Musammat Prembati, her daughter, if she survives her, would then be the next heir to the estate. On the other hand, if the will were a genuine document the widow would become the absolute proprietor of the property and might dispose of it to any one she likes, even to the exclusion of her daughter. Having regard to these circumstances we are of opinion that it is to the interest of the minor Musammat Prembati, who has unfortunately not been impleaded in this case but is entirely under the guardianship and control of the widow, that it should be declared that the will is not a genuine document and does not destroy the reversionary interest to the estate of the deceased Hoti Lal. We would therefore dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Boys and Mr. Justice Iqbal Ahmad.

1928 *February*, 9.

BULAQI DAS AND OTHERS (DEFENDANTS) *v.* KESRI AND OTHERS (PLAINTIFFS) AND DWARKA PRASAD (DEFENDANT).*

Civil Procedure Code, section 47; *order XXI, rule* 92—*Execution of decree—Property included in sale certificate in excess of what was ordered to be sold—Suit for recovery of excess—Limitation—Act No. IX of* 1908 (*Indian Limitation Act*), *schedule* 1, *article* 12.

In execution of a decree for sale on a mortgage certain property, which was neither included in the mortgage in suit nor in the decree, in some unexplained manner found its way into the sale certificate. The decree-holder himself was the auction purchaser.

Held, on suit by the judgement-debtors to recover the property sold in excess of what ought to have been sold, that the suit was not barred by either section 47 or order XXI, rule 92 of the Code of Civil Procedure and, as the sale of the excess property claimed was a nullity, article 12 of the first schedule to the Indian Limitation Act, 1908, could have no application. *Thakur Barmha* v. *Jiban Ram Marwari* (1), followed.

THE facts of this case sufficiently appear from the judgement of the Court.

Dr. *Kailas Nath Katju*, for the appellants.

Babu *Piari Lal Banerji*, for the respondents.

BOYS and IQBAL AHMAD, JJ. :—This defendants' appeal arises out of a suit for possession instituted under the following circumstances. Kalidin executed a mortgage, dated the 13th of June, 1873, in favour of the defendants Nos. 1 to 10, who later brought a suit on the basis of their mortgage, and brought some property to sale. A share was included in the sale which was not

*Second Appeal No. 988 of 1925, from a decree of D. C. Hunter, District Judge of Allahabad, dated the 12th of February, 1925, confirming a decree of Farid-ud-din Ahmad Khan, Subordinate Judge of Allahabad, dated the 29th of September, 1923.

(1) (1913) I.L.R., 41 Calc., 590.

included in the mortgage or in the decree. The decree-holders themselves purchased and obtained possession. The present suit was brought by the judgement-debtor to recover the excess sold.

The trial court gave the plaintiffs a decree, and the lower appellate court dismissed the defendants' appeal. The defendants again appeal to this Court.

It has been again contended for the appellants here, as it was in the courts below, that the suit is barred by section 47 of the Code of Civil Procedure, by order XXI, rule 92 of the Code of Civil Procedure, and by limitation. For the respondents, in addition to contesting that none of these pleas barred the suit, it has been further urged that the sale was in fact a nullity. We will proceed to consider first the plea of the appellants based on section 47 of the Code of Civil Procedure.

A large number of cases have been quoted to us on behalf of the appellants in support of their proposition that section 47 constituted a bar to the present suit.

It is, however, unnecessary for us to consider those cases in detail, for they can all be swept aside by one general criticism which covers them all, and that is that no case has been quoted to us in which the question has been definitely considered whether an auction-purchaser can be held to be the representative of a decree-holder for the purposes of section 47, and in which that question has also been definitely answered in the affirmative. The most that it has been possible to show on behalf of the appellants is that there have been some cases in which it was held that a proceeding came within section 47 to which only the judgement-debtor and the auction-purchaser were parties, but the effect of the absence of the decree-holder from the proceedings was not considered. It is only necessary to add that we ourselves can find no adequate reason of any sort for treating the

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auction-purchaser as a representative of the decree-holder, at any rate in the present proceeding. We hold, therefore, that section 47 did not constitute a bar to the present suit.

Next, does order XXI, rule 92, constitute a bar? It is clear that there are questions in which an auction-purchaser is involved which may come within the bar of rule 92; but it is not all questions in which an auction-purchaser is involved that come within that bar, but only those which come within the scope of one or other of the rules 89, 90 and 91. Of these three rules, we need only consider rule 90. It will be noted that when setting out above the facts of this case we did not state at what stage the mistake crept in. For the appellants it was admitted that the property which was included in the decree was only the property which was included in the mortgage. There was, therefore, no mistake in the decree. In the sale-certificate a share was included which was not included in the mortgage or in the decree. But we have no information at all as to whether the mistake first crept in the sale-certificate or whether it first appeared in the application for execution or whether it first appeared in the sale-proclamation. We specifically and in very clear terms asked counsel for the appellants what evidence there was to indicate at which of these three stages the mistake first occurred, and he told us in equally unmistakable terms that there was no evidence available —documentary or oral—on this point, and it was impossible to say from the record when and where the mistake occurred. At a later stage of the case, when endeavouring to establish that the suit was barred by rule 92 counsel found himself in some difficulty. Of the three rules 89, 90 and 91, he could only rely upon rule 90, and in examining the phraseology of that rule he found himself compelled to allege that the plaintiff had based his suit on a material irregularity or fraud in publishing

or conducting the sale. It was naturally difficult for him to establish this in face of the admission, which the material on the record compelled him to make, that there was no information at all as to when or how the mistake had occurred. He could only fall back upon paragraph 8 of the plaint which reads :

"Defendants Nos. 1 to 10 played this trick, that they alleged in the suit and the decree that the 4 annas, etc., share also includes an unmortgaged proportionate share of 6 pies. But they did not mention the unmortgaged 6 pies share and its proportionate share in the sale proceedings."

It is clear that in some circumstances the plaintiff might well be held bound by a statement in his pleadings, but into this particular statement we cannot read anything more than a general plea by the plaintiff that in some way or other more than the share mortgaged had been sold, and a natural belief in his mind that this mistake was due to some trick of the decree-holder. We are further confirmed in giving this and no more effect to the statement in paragraph 8 by the fact that the appellants themselves were constrained to admit before us that there is no evidence on the record at all as to how the mistake occurred, or at what stage it occurred. There was no issue on the point of fraud or relating to any trick of the decree-holder. We are again confirmed in our view as to the nature of the suit by the relief actually claimed. The plaintiffs asked in relief (*a*) that on the establishment of their rights in the excess share sold they may, on the dispossession of the defendants, be awarded proprietary possession. The relief asked for was not for the setting aside of the sale on the ground of fraud. We hold, therefore, that the suit was not barred by order XXI, rule 92.

The third plea raised on behalf of the appellants was that the suit was barred by article 12 of the Limitation Act. This plea is answered by a contention on behalf of

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the respondents that the sale was in fact a nullity, and that no question of limitation under article 12 could arise. With this latter view we agree. There was no prayer to have the sale set aside, nor was such prayer necessary. The plaintiff's case was straightforward and simple and may be stated as follows:—"The court has sold property of mine, with which the proceedings before it from the outset had no concern whatever. The court has no more power to do this than a private individual would have had. The whole proceeding is a nullity, and I am entitled to get back possession of my property."

We have been referred on behalf of the respondents to the decision of their Lordships of the Privy Council in *Thakur Barmha* v. *Jiban Ram Marwari* (1), and we think that that decision is in point. In that case the decree-holder had got certain property inserted in the sale-certificate in excess of that which had been sold, and their Lordships of the Privy Council refused all effect to the confirmation of the sale and the sale-certificate and all subsequent proceedings of the auction-purchaser. In view of our opinion that the sale of the excess share in this case was a nullity no question of limitation under article 12 can arise.

As a result of these findings on the above four points the appeal must fail and is dismissed with costs.

Appeal dismissed.

(1) (1913) I.L.R., 41 Calc., 590.

FULL BENCH.

Before Sir Grimwood Mears, Knight, Chief Justice, Mr. Justice Lindsay, Mr. Justice Dalal, Mr. Justice Mukerji and Mr. Justice Banerji.

KUNJ BIHARI LAL (DEFENDANT) *v.* KUNWAR JAI MAL SINGH (PLAINTIFF).*

1928 *February*, 14.

Dhardhura—Question re *applicability of custom—Complete altertaion in course of river—No evidence of similar change on previous occasions.*

Notwithstanding the admission of the existence, as between two villages situated on opposite banks of a river, of the custom of *dhardhura*, it was *held* that such custom was not applicable to the case of the river suddenly and completely altering its course and cutting off a large and recognizable area from one village, in face of the fact that no evidence was given that such a complete change of course had ever happened before for a space of twenty-two years. *Gulab Rai* v. *Girwar Singh* (1), referred to.

THE facts of this case sufficiently appear from the judgement of the Court.

Mr. *B. E. O'Conor*, Dr. *Kailas Nath Katju* and Pandit *Uma Shankar Bajpai*, for the appellant.

Dr. *Surendra Nath Sen*, Munshi *Ram Prasad* and Pandit *Ram Niwas Shukla*, for the respondent.

MEARS, C.J., LINDSAY, DALAL, MUKERJI and BANERJI, JJ. :—This is an appeal from the judgement of Babu Gauri Prasad, Subordinate Judge, Pilibhit, who decided that the proved or admitted custom of "dhardhura" did not apply in the particular circumstances of the case, and consequently decreed the claim of the plaintiff.

There is in the northern part of the province a river called Deoha, and on the western bank lies the village

*First Appeal No. 518 of 1924, from a decree of Gauri Prasad, Subordinate Judge of Pilibhit, dated the 13th of November, 1924.

(1) (1927) I.L.R., 49 All., 195.

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of Ujhainia, and immediately opposite it the village of Mittersenpur. Nobody can predict at the end of any monsoon where that river will finally settle, and an examination of the map shows how extremely unstable has been its course from 1306 *fasli* to 1329 *fasli*. Mr. *O'Conor* has handed up a map marked in yellow, blue, green and red, so as to impress upon us the astonishing character of the changes which have taken place in the site of the river during the last 22 years. It may be taken as completely certain that there does exist between the *zamindars* of Ujhainia and Mittersenpur the custom of accepting the deep stream of the river, wherever it may happen to be, as the boundary between the villages, and there is no instance of any resident of Ujhainia crossing the river and laying claim to land that for the moment may appertain to Mittersenpur. Similarly it is agreed that no resident of Mittersenpur ever has crossed over the river to lay claim to land which at the moment has passed to the Ujhainia side. *Khewats* from 1306 *fasli* have been produced which show that in the year 1898 the village of Ujhainia consisted of 189 acres. 11 years later, namely, in 1909, the area had increased to 360·33 acres. This increased amount represented land which hitherto had belonged to the *zamindars* of Mittersenpur. In 1910 there was an increase of some 17 acres to the advantage of Ujhainia, and in the years 1911 and 1912 a slight drop, when 33 acres passed back to Mittersenpur. In 1913 no less than 72 acres were added to Ujhainia. In 1914 the position was practically stationary, but in 1915 an addition of 50 acres brought up the area of Ujhainia to 465·56 acres. By 1919 that area had dropped to 425·18. In 1922 the river entirely altered its course and cut across from one point to another, with the result that that added to the Mittersenpur side of the river an area of no less than 360 acres, thus more than restoring the losses of Mittersenpur of the

previous twenty-four years. On the map which Mr. *O'Conor* has handed in, and which has been initialled "G. M. 1, 16th January, 1928", the course is represented by the red pencil markings. The blue markings are the course of the river before 1922. At page 19 of the record there is a very simple sketch on a small scale which illustrates the position.

This matter originally came before a Division Bench, and at the hearing before them it was assumed by all parties that the statement of the plaintiff, that in 1329 *fasli* nearly 2,000 *bighas* of land appeared on the opposite bank, meant that the area included within the arc on the sketch at page 19 was 2,000 *pakka bighas* or roughly 1,250 acres, and that this was a suit by the zamindar of Ujhainia, who had only suffered a loss of approximately one quarter of the land which had passed over to the Mittersenpur side. It now appears that the total area of land affected by the sudden change of the course of the river is not more than 360 acres in all.

There being a question as to whether this case was distinguishable from the case of *Gulab Rai* v. *Girwar Singh* (1), it was considered desirable to have this matter re-heard before a Full Bench. During the arguments before the Full Bench the order-sheet was referred to, and it then appeared that the plaintiff's statement made to the court, printed at page 5, was not challenged by the defendant when he stated that never before had the river suddenly changed its course. The defendant elected to call no evidence, but it would have been open to him to have proved, had such been the fact, that in the years 1913 and 1915 the 72 acres and 50 acres, respectively, were lost to the village of Mittersenpur, not by encroachment, but by the river definitely deserting its old channel and cutting a new channel leaving undisturbed recognizable land between the new channel and the old.

(1) (1927) I.L.R., 49 All., 195.

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It has been argued before us that it would be improper for us, having regard to the description of this river given at page 11 and onwards of the Pilibhit Gazetteer, to assume that in 1913 and 1915 the river suddenly changed its course by cutting for itself a new channel. The Gazetteer shows that in the rainy season the Deoha becomes a violent, turbulent river, and one of such character that it might in consequence of heavy rains gradually shift its channel so as to transfer from one side to the other even so considerable an area as 72 acres. The learned Subordinate Judge has said, and we agree with him, and indeed we think it to be the kernel of the whole case, that if the defendant had obtained an admission from the plaintiff that on two previous occasions, namely, in 1913 and in 1915, the river had cut a completely new channel and that the custom of the deep bed of the stream was followed, he would have held that the custom, as alleged by the defendant, was wide enough to cover the happenings of 1922. Whilst there is abundant evidence that there is a custom of dhardhura", there is no evidence that such an event ever before happened as the complete abandonment of the old channel and the making of a new one by the river. On the ground, therefore, that the defendant failed to give evidence on this essential point, we uphold the decision of the learned Subordinate Judge and dismiss this appeal with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Sulaiman and Mr. Justice Kendall.

A. W. DOMINGO (PLAINTIFF) *v.* L. C. DESOUZA (DEFENDANT).* 1928 *February*, 14.

Act No. IX of 1872 *(Indian Contract Act), section* 78—*Shares—Agreement to sell so many shares in a particular company—"Unascertained goods"—Act No. VII of* 1913 *(Indian Companies Act), sections* 18 *and* 28—*Breach of agreement to transfer shares—Measure of damages.*

"Goods" as defined in the Indian Contract Act, 1872, comprise every kind of movable property, including shares in a company. Where, therefore, a person agrees to sell so many shares in a company without specifying the numbers of the share certificates, the agreement is merely an agreement to sell unascertained goods and passes no interest in any shares owned by the vendor until such shares are definitely ascertained.

An agreement for the sale of shares does not imply a further agreement to have the transferee's name registered as the holder.

In the event of the proposed transferee refusing to complete such an agreement by the purchase of the stipulated number of shares, the measure of damages would be the difference between the contract price and the market price at the time when the breach took place; but it would be the duty of the transferor to mitigate the loss consequent upon the breach. *Jamil* v. *Moolla Dawood Sons and Co.* (1), *Maneckji Pestonji Bharucha* v. *Wadilal Sarabhai and Co.* (2), *London Founders Association* v. *Clarke* (3), *Muir Mills Co. Ltd., of Cawnpore* v. *T. H. Condon* (4), *Bahadur Singh* v. *Shiam Sundar Tug* (5), and *Nanney* v. *Morgan* (6), referred to.

*Fisrt Appeal No. 327 of 1925, from a decree of Kashi Prasad, Second Additional Subordinate Judge of Cawnpore, dated the 20th of April, 1925.

(1) (1915) I.L.R., 43 Calc., 493. (2) (1926) I.L.R., 50 Bom., 360.
(3) (1888) L.R., 20 Q.B.D., 576. (4) (1900) I.L.R., 22 All., 410.
(5) (1914) I.L.R., 36 All., 365. (6) (1887) 37 Ch. Div., 346.

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THE facts of this case are fully stated in the judgement of the Court.

Babu *Piari Lal Banerji*, for the appellant.

Dr. *Kailas Nath Katju*, for the respondent.

SULAIMAN and KENDALL, JJ. :—This is a plaintiff's appeal arising out of a suit for rendition of accounts brought against the defendant. The plaintiff's case was that on the 16th of February, 1920, the parties entered into a definite contract under which it was agreed that the defendant was to advance to the plaintiff money necessary for the purchase of 100,000 French francs, the amount being provisionally estimated to be Rs. 60,000, at 9 per cent. per mensem interest, payable in two years; it was agreed that these francs would be kept in fixed deposit in some French Bank, and on the expiry of the period of deposit would be converted into pounds sterling and remitted to India, and that the defendant, after deducting the amount of his principal and interest, was to pay to the plaintiff the balance of the profit, if any, and if there was loss the plaintiff would be liable for it. The defendant did not deny the completion of the contract for the purchase of the French francs. But his main pleas were that subsequently, in June, 1920, the plaintiff entered into another contract with the defendant for the purchase of 500 ordinary and 500 preference shares of the Premier Oil Mills, which were to be taken over by the plaintiff in the month of December following, and in case the plaintiff failed to take them over, the defendant would be at liberty to set off and adjust the accounts for profit and loss, as the case might be, on the two transactions. There was no express mention in the written statement that the plaintiff was to pay up the amount borrowed by him within any fixed time, or that he had broken the contract by not paying the amount within that time. It was, however, pleaded that the plaintiff failed to perform his part of the contract and

the defendant was therefore justified in "putting an end to the whole affair" on the 16th April, 1922. There was also a plea that the plaintiff accepted the position as communicated to him by the letter bearing the date mentioned, and after a lapse of two years was estopped from recovering anything.

The main questions of fact which were in dispute were (1) whether the plaintiff had agreed to make monthly payments by way of instalments of the amount which had been advanced to him by the defendant on the promissory notes; (2) whether there was a complete contract for the purchase of 500 ordinary and 500 preference shares of the Premier Oil Mills Company in June, 1920, to be delivered in December following; (3) whether it was a part of the contract in June that the two accounts, namely, the purchase of francs and the purchase of Premier Oil Mills shares, should be adjusted together and the profits on one set off against the loss on the other; and (4) whether the defendant sent any letter on the 16th of April, 1922, intimating that he would put an end to the "whole affair" after a fortnight if no reply was received thereto. The questions of law which would arise would be (*a*) whether there was only a contract for the purchase of the Premier Oil Mills shares or whether there was a complete sale, and (*b*) whether there was any breach committed by either party and (*c*) the legal consequences that would follow.

[Their Lordships then considered the evidence relating to the various questions of fact propounded, and came to the following findings: (1) that there was no agreement to make monthly payments by way of instalments of the amount which had been advanced by the defendant to the plaintiff; (2) that there had been a complete contract for the purchase of 500 ordinary and 500 preference shares of the Premier Oil Mills Company

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in June, 1920, to be delivered in December following, and that it had been broken by the plaintiff; (3) that it was not proved that it was any part of the contract between the parties that the two accounts, namely, the purchase of francs and the purchase of Premier Oil Mills shares, should be adjusted together and the profits on one set off against the loss on the other; and (4) that it was not proved that the defendant had sent any letter on April 16, 1922, intimating that he would put an end to the "whole affair" after a fortnight if no reply was received thereto. The judgement then continued :—]

There is really no dispute as regards the facts relating to the transaction of the French francs. These were purchased by the defendant through the Alliance Bank of Simla for the plaintiff. [Their Lordships discussed the evidence and proceeded.]

We are, therefore, of opinion that the interest which had passed to the plaintiff in the francs, which had been purchased by him out of the amount advanced to him by the defendant, remained vested in him and the defendant's remedy was to recover the amount from the plaintiff by recouping himself out of the amount realized by the conversion of those francs.

As regards the transaction relating to the Premier Oil Mills shares we are of opinion that it did not pass beyond the stage of a mere contract, and that it had not become an out and out sale of those shares by the defendant to the plaintiff. The defendant, both in his oral evidence and in his letter dated the 4th of November, 1920, admitted that the shares would have to be taken over in the month of December. The defendant in June, 1920, possessed 500 ordinary and 2,000 preference shares of the Premier Oil Mills Company. The contract was to purchase 500 ordinary and 500 preference shares.

The defendant has admitted in his evidence that he was prepared to sell 500 ordinary shares at a reduced price simply because the plaintiff was prepared to purchase the 500 preference shares. Thus the contract of sale of those two sets of shares was one and the same, though the rates for the two were separately mentioned. It is impossible to hold that these two constituted two separate contracts and not one contract. The learned advocate for the defendant has to concede that so far as 500 preference shares are concerned they could not be said to have been definitely ascertained goods at that time when the defendant in fact possessed 2,000 such shares. So long as the share certificates were not delivered and the numbers were not specified they remained unascertained, and it would have been open to the defendant to hand over any 500 out of the 2,000 shares possessed by him. As regards the 500 ordinary shares, no doubt the defendant had only that number at that time, but as the delivery was to take place in December it would have been open to the defendant to hand over any other 500 ordinary shares which he might acquire before that date to the plaintiff. It is, therefore, not possible to hold that even the 500 ordinary shares which the defendant would sell to the plaintiff were definitely ascertained in June, 1920. We would also hold that such contract for the sale of two sets of shares was one and the same, and so long as part of the goods had not been definitely ascertained the whole must be deemed not to have been completely ascertained at the time when the contract was entered into. The price, however, was fixed.

As regards the breaches of the contracts, we are of opinion that, there being no contract for the payment of any instalment, there was no breach by the plaintiff of the contract up to April, 1922, in connection with the purchase of francs. As regards the contract for the purchase of the Premier Oil Mill's shares, we are

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of opinion that there was a definite breach committed by the plaintiff in December, 1920, when he failed to take over the shares, and in any case, even assuming that time was not of the essence of the contract, there was undoubtedly a breach committed on the 22nd of February, 1921, when the plaintiff definitely denied that he had entered into any such contract. On our finding that there was no contract to adjust the two accounts, it is obvious that the defendant was bound to treat the two transactions separately, although as a net result he might deduct, before making actual payment, what was due to him on one transaction from what would be due from him on the other.

The learned advocate for the plaintiff contends that there being no actual sale of the Premier Oil Mills shares but only a contract, it was the duty of the defendant, when the contract was repudiated or broken, to reduce the loss by re-selling the shares in open market, and accordingly the defendant can only claim the difference between the contract price and the price which these shares would have fetched in open market on the date when the breach was committed by the plaintiff. His argument is that the defendant was not entitled to wait for two years longer and then claim to deduct the difference between the contract price and the price which then prevailed, from the profit which the plaintiff had made on the transaction of francs. He is prepared to concede that a mere failure to take over delivery of shares in December might not amount to a breach, and contends that at the best the breach took place on the 22nd of February, 1921, when the transaction was repudiated by the plaintiff. What the defendant has done is to settle the account privately at home and to allege that over Rs. 6,000 were due to him which he was prepared to forgo. He has not filed any statement of account which would show that his calculation was correct.

On the other hand, the learned advocate for the defendant has argued that under section 78 of the Indian Contract Act the sale was complete by mere offer and acceptance, inasmuch as both delivery and payment were to be postponed to a future date.

Section 28 of the Indian Companies Act (Act VII of 1913) provides that the shares or other interest of any member in a company shall be movable property, transferable in manner provided by the articles of the company. Section 17 authorizes a company to frame articles of association and adopt all or any of the regulations contained in Table A in the first schedule. No regular and certified copy of the articles of association of the Premier Oil Mills Company having been produced, though called for, in the absence of anything to show to the contrary we presume that the regulations contained in Table A of the first schedule attached to the Indian Companies Act govern this company also. If it was the defendant's case that this company had in any way modified or altered those regulations, it was undoubtedly his duty to prove that this was so. Regulation 18 provides that the instrument of transfer of any share in the company shall be executed both by the transferor and the transferee and the transferor shall be deemed to remain holder of the share until the name of the transferee is entered in the register of members in respect thereof. Regulation 19 provides that the share shall be transferred in a particular form. Regulation 20 authorizes the directors to decline to register any transfer of shares, *not being fully paid shares*, to a person of whom they do not approve, and may also decline to register any transfer of the shares on which the company has a *lien*. The learned advocate for the plaintiff contends that the Companies Act is a Special Act and provides a special mode of transfer of shares of the company, and that unless that method is adopted no transfer in law takes

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place. He also contends that the Regulations being part of the law by virtue of section 28, the transferor must be deemed to remain holder of the share until the name of the transferee is entered in the register. On the other hand, the contention on behalf of the defendant is that these regulations and articles of association are meant for the management of the company itself and they govern the members of the company, but that they do not in any way affect the rights of private dealings as between the transferor and the transferee, and that such rights are governed by the Contract Act. On behalf of the plaintiff reliance has been placed on several English cases and particularly on the case of *London Founders Association* v. *Clarke* (1), where it was laid down that in a contract for the sale of the shares of a company there was no implied covenant that the transferee's name would be registered by the directors of the company. Similar observations are to be found in the cases of the *Muir Mills Co. Ltd. of Cawnpore* v. *T. H. Condon* (2) and *Bahadur Singh* v. *Shiam Sundar Tug* (3). On the authority of these cases it is contended that the registration by the company is a subsequent act which in no way affects the completion of the sale of the shares. We might point out that to say that the registration of the transferee's name is no part of the contract between the transferor and the transferee, is not the same thing as saying that sale can take place even without registration. If the transferor does not undertake to get the name of the transferee registered, and indeed when the objection to the registration of the transferee's name may be on account of the directors' disapproval of him, there may not be any such implied undertaking. The question to be considered really is whether a sale can take place before the registration, or even before any instrument of

(1) (1888) L.R., 20 Q.B.D., 576. (2) (1900) I.L.R., 22 All., 410.
(3) (1914) I.L.R., 36 All., 365.

transfer is executed or the share certificates are handed over to the transferee. The learned advocate for the appellant has drawn our attention to the case of *Nanney* v. *Morgan* (1), where it was held that non-compliance with the rules of the company for the complete transfer of a share prevented the share from *legally vesting* in the transferee, though belonging in equity to him. Our attention was also drawn to Buckley on the Companies Act, 10th edition, page 586, where it is stated that a transfer not in compliance with the requirements of the articles of association carries to the person whose name is subsequently filled in as transferee not only the equitable but also the legal interest, meaning the legal right to call upon the company to register the transfer, but there is no legal title to the share until registration.

In our opinion it is not absolutely necessary in this case to decide the general question whether if there were a conflict between the Contract Act and the Companies Act the latter should prevail, or whether the sale of shares can take place between the transferor and the transferee under the Contract Act, while no such sale can be recognized under the Companies Act. As pointed out by us, this is a case where the goods were not definitely ascertained in June, 1920, when the contract was made. Even under section 78 of the Indian Contract Act no sale can be effected by mere offer and acceptance, even for a definite price, when the goods have not been ascertained. Section 82 clearly provides that where the goods are not ascertained at the time of making the contract of sale, it is necessary to the completion of the sale that the goods shall be ascertained. The illustration to that section also makes it clear that even if the goods exist but are mixed up with other goods of the transferor, there is no ascertainment so long as they have not been separated and ear-marked. In the case of *Jamil* v. *Moolla Dawood Sons and Co.*, (2), where shares of the British

(1) (1887) 37 Ch. Div., 346. (2) (1887) I.L.R., 43 Calc., 493.

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Petroleum Co. Ltd. had been contracted to be sold, their Lordships of the Privy Council at page 503 remarked "the seller was and remained the legal holder of the shares", and held that section 73 of the Indian Contract Act was but declaratory of the right to damages, which was based on the principle that in a contract for sale of negotiable securities the measure of damages was the difference between the contract price and the market price at the date of the breach, with an obligation on the part of the seller to mitigate the damages by getting the best price he can at the date of the breach; that it was the duty of the person claiming damages to take all reasonable steps to mitigate the loss consequent upon the breach and he could not claim as damages any sum which was due to his own neglect. But the loss to be ascertained is the loss at the date of the breach, and if at that date he could do something or did something which mitigated the damage, the other party was entitled to the benefit of it.

Still more clearly their Lordships have made the same pronouncement in the case of *Maneckji Pestonji Bharucha* v. *Wadilal Sarabhai & Co.* (1). At page 366 their Lordships remarked that it was quite true that the full property in shares in a company is only in the registered holder, and that an unregistered transferee had not a perfected right of property which he would have had if he had been the registered holder of the shares which he was selling; the company is entitled to deal with the share holder who is on the register, and only a person who is on the register is in the full sense of the word owner of the share. It was also held that the word "goods" as defined in the Indian Contract Act included every kind of movable property, including shares of a company, and that section 78 might therefore be applicable. In that case also the goods which

(1) (1926) I.L.R., 50 Bom., 360.

had been contracted to be sold were so many shares of Alcock Ashdown and Co. Ltd., deliverable in the following month, and not any particular shares. Their Lordships held that the goods were not ascertained goods at the time of the contract. But as soon as the broker handed over the certificates and the transferor and the transferee accepted them and gave a cheque, the goods became ascertained goods, and the sale was complete and the property passed.

In the present case we have already remarked that the goods were not ascertained at the time of the contract. The defendant has further admitted that the shares remained standing in his name, and that they were never transferred to the plaintiff's name and that the plaintiff also never received any dividend. The defendant on his own showing did not do all that he could have done, and neither executed any deed or instrument, nor got the shares transferred to the plaintiff. It is therefore impossible to hold that the legal title to the shares passed to the plaintiff and that the latter became the full owner thereof. The transaction really amounted to a mere contract and a breach of it was committed by the plaintiff.

In view of the provisions of section 73 and the observations of their Lordships of the Privy Council in the first case cited above, it is clear that the measure of damages would be the difference between the contract price and the market price at the time when the breach took place, and that it was the duty of the defendant to reduce the loss as much as possible. We are accordingly clearly of opinion that the defendant is not entitled to claim credit for the entire difference between the contract price and the price of those shares in April, 1922, more than one year after the breach. The defendant was only entitled to claim the difference between the contract price and the price of those shares on the 22nd of

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February, 1921, when the plaintiff repudiated the transaction, and declined to take those shares. If the defendant did not sell those shares in the market but kept them with him, he took the risk upon himself and he is not entitled to charge the plaintiff with the further loss which he suffered.

* * * *

We accordingly allow this appeal, and setting aside the decree of the court below pass a preliminary decree under order XX, rule 16, of the Code of Civil Procedure, calling upon the defendant to render account of the transaction of the purchase of francs to the plaintiff and to deduct from the amount due to the plaintiff any loss which he may have suffered on account of the breach of contract to purchase the Premier Oil Mills shares up to the 22nd of February, 1921. The actual account will be calculated before the final decree is passed and the parties will be at liberty to produce further evidence on the point. As regards costs, we are of opinion that inasmuch as neither party disclosed the whole truth before the court they should bear their own costs in the court below and costs in this Court up to this stage.

Appeal allowed.

Before Mr. Justice Sulaiman and Mr. Justice Kendall.

1928 *February*, 17.

CHHEDI RAM (DEFENDANT) *v.* GOKUL CHAND AND ANOTHER (PLAINTIFFS).*

Privacy—Existence of public lane between houses of parties not incompatible with existence of right.

The fact that there is a public lane between the two houses concerned is not incompatible with the existence of a right of privacy. *Kuvarji Premchand* v. *Bai Javer* (1), *Jamil-ud-din* v. *Abdul Majeed* (2), *Fazal Haq* v. *Fazal Haq* (3), and *Gokal Prasad* v. *Radho* (4), followed.

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*Second Appeal No. 1494 of 1925, from a decree of Raj Behari Lal, Subordinate Judge of Ghazipur, dated the 29th of April, 1925, confirming a decree of Vishambhar Prakash, Munsif of Ghazipur, dated the 8th of September, 1924.

(1) (1869) 6 Bom. H.C.R., 143. (2) (1915) 13 A.L.J., 361.
(3) (1927) 26 A.L.J., 49 (4) (1888) I.L.R., 10 All., 358.

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THE facts of this case sufficiently appear from the judgement of the Court.

Munshi *Kama-la-kant Varma* and Munshi *Surendra Nath Varma*, for the appellant.

Munshi *Shiva Prasad Sinha*, for the respondents.

SULAIMAN and KENDALL, JJ. :—This is a defendant's appeal arising out of a suit for the closing of three windows opened by the defendant in his second storey, on the ground that they infringed the plaintiffs' right of privacy as regards their room in the second storey. The houses of the parties are situate opposite to each other and are separated by a lane which is described as a private lane in the plaint. In the courts below the defendant did not take up the position that there was any public lane intervening between the houses or that the existence of such a lane destroyed the right of privacy. Both the courts below have decreed the claim.

As pointed out by Sir JOHN EDGE in the leading case of *Gokal Prasad* v. *Radho* (1), "every case must depend on its own facts and there are two primary questions which arise in all such cases: (1) does the privacy in fact and substantially exist and has it been and is it in fact enjoyed? and (2) was the privacy substantially or materially interfered with by acts of the defendant done without the consent or acquiescence of the person seeking relief against those acts?"

The defendant had urged that inasmuch as there were other windows in his house on the same storey no privacy existed, and also pleaded that the plaintiffs' apartment was not regularly occupied by his females as they were only occasional visitors thereto. It is also suggested that they did not observe strict *pardah*. The lower appellate court has however recorded a finding that the other windows do not substantially expose the privacy of the plaintiffs' room, that the apartment in question

(1) (1888) I.L.R., 10 All. 353 (356).

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is occupied by the females of the plaintiffs' house when they come to reside at this place and that they observe *pardah*. These findings in our opinion are findings of fact and must be accepted. They amount to a clear finding in favour of the respondents that the right of privacy did in fact exist and was really enjoyed by the plaintiffs.

The next point urged is that the existence of a lane between the two houses disentitles the plaintiffs from seeking the relief which they have sought. It is urged that there can be no such right when a lane over which the public can pass intervenes. The plaintiffs' room, however, is on the second storey and is not overlooked by people who pass along this lane. This position was not taken up by the defendant in the court below, and we have therefore no finding whether this lane is a private lane or a public lane. But even if it were a public lane, there are undoubtedly several cases against the appellant in which it has been laid down that the existence of even a public lane in between would not destroy the right of privacy. The earliest case which has been brought to our notice is that of *Kuvarji Premchand* v. *Bai Javer* (1). This was followed by a learned Judge of this Court in the case of *Jamil-ud-din* v. *Abdul Majeed* (2). In a recent case decided by a Bench of this Court, namely, *Fazal Haq* v. *Fazal Haq* (3), there was a road intervening between the houses of the parties. Although the point raised in this appeal was not expressly decided in that case, nevertheless the fact of the existence of a road between the two houses was prominently before the learned Judges.

Having regard to these authorities we must hold that there is no force in this appeal. It is accordingly dismissed with costs.

Appeal dismissed.

(1) (1869) 6 Bom. H.C.R., 143. (2) (1915) 13 A.L.J., 361.
(3) (1927) 26 A.L.J., 49.

MISCELLANEOUS CIVIL.

Before Mr. Justice Boys and Mr. Justice Iqbal Ahmad.

IN THE MATTER OF GOVIND PRASAD.*

1928
February, 23.

Act No. VIII of 1890 (*Guardians and Wards Act*), *section* 3 *—Letters Patent, clause* 12*—Guardian and minor—Joint Hindu family—Application by* karta *to be appointed guardian of minor members.*

Neither the High Court nor the District Court will contemplate the appointment of a guardian of property, whether that guardian be the manager or no, in the case of a joint Hindu family, by virtue of any powers suggested to be conferred under the Guardians and Wards Act (VIII of 1890). *Jhabbu Singh* v. *Ganga Bishan* (1), *Ellen Ramm* v. *Charles Spencer* (2), *Jairam Luxmon, Petitioner* (3), *Jagannath Ramji, Petitioner* (4), and Re *Manilal Hurgovan* (5), referred to.

The High Court has jurisdiction, by virtue of clause 12 of the Letters Patent, in respect of the persons and properties of minors, but the High Court refused to exercise that jurisdiction in the case of a joint Hindu family, on the grounds of inexpediency and want of precedent.

THE facts of the case were as follows:—

Applicant was the *karta* of a joint Hindu family governed by the *Mitakshara* and including minor sons. Owing to protracted illness in the family, applicant's business had to be closed and debts were incurred, first for the treatment and support of the family and subsequently for defraying the expenses of his daughter's marriage and for paying off his creditors. As a result applicant's house valued at Rs. 10,000 was mortgaged and as he had neither means nor health to earn a living, the total debts gradually swelled to about Rs. 8,000. It having become impossible to pay these debts and there

*Miscellaneous application of Govind Prasad.

(1) (1895) I.L.R., 17 All., 529. (2) (1903) 2 A.L.J., 81.
(3) (1892) I.L.R., 16 Bom., 631. (4) (1893) I.L.R., 19 Bom., 96.
(5) (1900) I.L.R., 25 Bom., 353.

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being a purchaser willing to pay Rs. 15,000 for the house, applicant applied for being appointed "guardian of the property of the minors and to be authorized to convey the right, title and interest of the minors in the property on such terms as the High Court may think proper", on the ground that the transaction was a very profitable bargain for the minors as well as the applicant.

Munshi *Hanuman Prasad Agarwal*, for the applicant.

BOYS and IQBAL AHMAD, JJ. :—This application is not in form and does not comply with the rules of the Court in that it does not, in the heading, quote the law giving the right to apply and should have been returned to the applicant on that ground alone. Counsel for the applicant stated that he made the application on the authority of certain decisions of the Bombay High Court and eventually relied upon clause 12 of the Letters Patent of this Court read with section 3 of the Guardians and Wards Act, VIII of 1890, and it is with reference to these that we deal with the application. We may note at once that it is not contested that in view of the rulings of this Court,—compare *Jhabbu Singh* v. *Ganga Bishan* (1)—neither this Court nor the District Court will contemplate the appointment of a guardian of property, whether that guardian be the manager or no, in the case of a joint Hindu family, by virtue of any powers suggested to be conferred under the Guardians and Wards Act (Act VIII of 1890).

It is unnecessary for us to trace back the authority of this Court in reference to the persons and estates of infants conferred by clause 12 of the Letters Patent. It is sufficient to say that we are satisfied that the jurisdiction of the Court of Chancery, which descended to the Supreme Court of Calcutta and so to the High Court at Calcutta and so to this Court by virtue of clause 12, exists.

(1) (1895) I.L.R., 17 All., 529

The question whether we ought to exercise that jurisdiction or not in the case of a joint Hindu family is quite another matter. We have been referred to several cases of the High Court at Bombay, to one decision of this Court and to one decision of the Calcutta High Court. To consider first the authority in this Court—*Ellen Ramm* v. *Charles Spencer* (1). In that case the only point relevant to the present is that the learned CHIEF JUSTICE and BURKITT, J., referred to the powers of this Court conferred by the Letters Patent and apparently accepted that such power exists. That is the view which we have already ourselves accepted. In Bombay there was a series of decisions, e.g., *Jairam Luxmon, Petitioner* (2), *Jagannath Ramji, Petitioner* (3) and Re *Manilal Hurgovan* (4). In the latter case the learned Judges were obviously unwilling to hold that they had jurisdiction or that, if they had jurisdiction, it was a case in which they should act. But it was pointed out that there was a series of cases in which the Court had acted and their Lordships obviously consented to interfere in the particular case because they were desirous of not running counter to the practice. It was obviously only a case of *stare decisis*. They eventually appointed a guardian and gave sanction to the sale of the property on certain conditions which, it was considered, would ensure for the minor a moiety in the proceeds. No question appears to have been raised as to what was to be the effect of this transaction on the joint or separate nature of the family in the future. That is a matter in which it is not difficult to see that trouble might arise, and is one further reason for refusing to countenance the practice in the exercise of the jurisdiction of this Court of which, so far as we are aware, there is no instance in this Court. It would seem that if an application like the present was

(1) (1903) 2 A.L.J., 81. (2) (1892) I.L.R., 16 Bom., 734.
(3) (1893) I.L.R., 19 Bom., 96. (4) (1900) I.L.R., 25 Bom., 353.

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proper to be granted, it would equally be proper for us to consider applications which might be made in every single case in which a manager of a joint Hindu family might come to this Court and say "either the sole or one of many members of the family is a minor and I want the Court to appoint me his guardian and sanction a particular transaction because I shall thereby be able to get a better price." It is admitted that it will not help the applicant in any way to get himself appointed a guardian unless he can also induce the Court to enter into the merits of the proposed transaction and give it the Court's sanction. Another difficulty that must arise is in the proposed securing of the minors' interest in half the proceeds. Where is the money to be deposited, who is to be responsible for it, what rate of interest is to be paid on it, when is it to become available to the minors, and a number of other similar questions must follow where it is suggested that a wholly new practice is to be sanctioned.

We have hitherto referred only to the difficulties that must necessarily arise. On the other hand, to refuse such applications as these does not in our view put the manager of the joint Hindu family in a difficult position. In the present case, at any rate, the applicant can proceed to effect a separation from his sons and that can be done very speedily. He can then apply in the ordinary way to be appointed guardian of his sons and his sons' estate and proceed to deal with the property both on behalf of himself and his sons, applying if necessary under section 29 of the Guardians and Wards Act. His purpose will thereby be served with facility, without this Court embarking on a wholly new practice. We dismiss the application.

Application dismissed.

APPELLATE CIVIL.

Before Mr. Justice Sulaiman and Mr. Justice Kendall.

SHUBRATI AND ANOTHER (PLAINTIFFS) *v.* SHAMS-UD-DIN (DEFENDANT).*

1928 *February*, 27.

Suit for malicious prosecution—"Want of reasonable and probable cause"—Bearing of the findings of the criminal courts on the subsequent civil suit for damages.

In suits for malicious prosecution, where the facts contained in the plaint are professedly within the personal knowledge of the complainant, the mere fact that the first criminal court believed the complainant's statement and convicted the accused would not be any evidence of the existence of reasonable and probable cause, if the appellate court comes to a contrary conclusion. The judgements of the criminal courts are conclusive for the purpose of showing that the prosecution terminated in favour of the plaintiff, but it is doubtful if the findings of the criminal courts by themselves are any evidence a malice or want of reasonable and probable cause: it is for the civil court to go into all the evidence and decide for itself whether such malice or want of reasonable and probable cause existed or not. *Shama Bibee* v. *Chairman of Baranagore Municipality* (1), distinguished, *Padarath* v. *Dulam* (2), *Radhe Lal* v. *Munnoo* (3), and *Madho Singh* v. *Mangal Singh* (4), followed. *Jadubar Singh* v. *Sheo Saran Singh* (5), and *Balbhaddar Singh* v. *Badri Sah* (6), referred to.

THIS was an appeal arising out of a suit for malicious prosecution. The defendant respondent filed a complaint on the 22nd of February, 1923, alleging that he was in possession of a certain house in which he had kept certain goods of his, and that the present plaintiffs broke open the house and removed his goods. The complaint was under section 448 of the Indian Penal Code i.e.,

*Second Appeal No. 760 of 1925, from a decree of Kauleshar Nath Rai, Judge of Small Cause Court, exercising the powers of a Subordinate Judge of Allahabad, dated the 13th of January, 1925, reversing a decree of Muhammad Taqi Khan, Munsif of West Allahabad, dated the 31st of March 1924.

(1) (1910) 12 C.L.J., 410. (2) (1912) 10 A.L.J., 423.
(3) (1913) 11 A.L.J., 125. (4) (1924) 79 Indian Cases, 1023.
(5) (1898) I.L.R., 21 All., 26. (6) (1926) I.L.R., 1 Luck., 215.

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house trespass. The Magistrate charged the plaintiffs under section 379 also. The accused persons were convicted by the first court under section 448 and acquitted of the charge under section 379; but on appeal they were acquitted of the charge under section 448 also. The plaintiffs then brought the present suit for damages for malicious prosecution. The defendant in his written statement pleaded that his complaint was true and that the allegation made by him was quite correct. He produced six witnesses in support of his case. The plaintiffs also led some oral evidence. The Munsif came to the conclusion that the defendant was a simple mortgagee of the house and was not in actual possession of it and had not kept any goods therein, but that he might have repaired the house in order to protect his rights thereto. He distinctly found that the plaintiffs' evidence proved that they were lawfully in possession of the house in question. He then concluded that the defendant's complaint was quite false and that the charges were certainly false to the knowledge of the defendant. On this finding he granted a decree for damages in favour of the plaintiffs.

On appeal the Subordinate Judge reversed the decree. After having set forth the above facts in brief, he remarked that the plaintiffs had been convicted by the first court, and, though they were subsequently acquitted on appeal, the fact of the conviction by a competent court was evidence of the strongest possible character, if unrebutted, against the plea of want of reasonable and probable cause. He relied in support of his view on the cases of *Shama Bibee* v. *Chairman of Baranagore Municipality* (1) and *Jadubar Singh* v. *Sheo Saran Singh* (2). He did not attempt to consider the evidence of the parties which was produced in the civil suit, and did not dissent from or set aside the findings of the Munsif. In

(1) (1910) 12 C.L.J., 410. (2) (1898) I.L.R., 21 All., 26.

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fact he did not, in view of the circumstance quoted by him, consider it at all necessary to go into the evidence. The plaintiffs appealed.

Mr. *S. M. Husain* and Babu *A. P. Bagchi*, for the appellants.

Maulvi *Mushtaq Ahmad* (for whom Munshi *Jai Kishen Lal*), for the respondent.

The judgement of the Court (SULAIMAN and KENDALL, JJ.), after setting out the facts as above, thus continued :—

In our opinion the view taken by the learned Subordinate Judge was quite wrong. The case of *Shama Bibee* v. *Chairman of Baranagore Municipality* (1) is clearly distinguishable, because in that case the allegations in the complaint were not within the personal knowledge of the Municipal Board which was sued as a defendant for damages. No doubt the case of *Jadubar Singh* v. *Sheo Saran Singh* (2) supports the Judge's view. In that case the lower appellate court had found that there was a good deal of oral evidence which satisfactorily proved the innocence of the plaintiff, and that the defendants had in the criminal case stated that they had seen the plaintiff and his companion carrying away the crops and had identified them while beating them, and it therefore thought that under the circumstances there could be no question of reasonable and probable cause, and that the prosecution was false. BANERJI, J., remanded an issue and ultimately allowed the appeal without setting aside the findings of the lower appellate court, on the main ground that "the fact of a court of competent jurisdiction (Magistrate's court) having believed that the complaint is a true complaint is a strong evidence to show that it was not brought without reasonable and probable cause." He was influenced considerably by the circumstances that the appellate criminal court had given

(1) (1910) 12 C.L.J., 410. (2) (1898) I.L.R., 21 All., 26.

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the plaintiff only the benefit of a doubt. With great respect we would hold that in cases where the facts contained in the plaint are professedly within the personal knowledge of the complainant, the mere fact that the first criminal court believed the complainant's statement and convicted the accused would not be any evidence of the existence of reasonable and probable cause if the appellate court comes to a contrary conclusion. The judgements of the criminal courts are admissible for the purpose of showing that the prosecution terminated in favour of the plaintiff. It is not so material whether it was the first court which acquitted the accused or it was the appellate court. KNOX, J., in the case of *Padarath* v. *Dulam* (1), held that "the mere fact of one court having believed the complaint is not sufficient evidence of reasonable and probable cause," and, in the case of *Radhe Lal* v. *Munnoo* (2), again held that "no question of reasonable or probable cause arises where the charge is such as must be true or false to the knowledge of the defendant."

In the case of *Madho Singh* v. *Mangal Singh* (3) MUKERJI, J., has also held that "A suit for malicious prosecution does not necessarily fail where there has been a conviction by the court of first instance and an acquittal by the appellate criminal court, if on the evidence the court is convinced that the charge was utterly false and therefore malicious."

We agree with the view expressed in the later cases. In the recent case of *Balbhaddar Singh* v. *Badri Sah* (4), their Lordships of the Privy Council have laid down that in an action for malicious prosecution the plaintiff has to prove (1) that he was prosecuted by the defendant, (2) that the prosecution terminated in his favour, (3) that it was instituted without any reasonable and probable cause

(1) (1912) 10 A.L.J., 423.
(2) (1913) 11 A.L.J., 125.
(3) (1924) 79 Indian Cases, 1023.
(4) (1926) I.L.R., 1 Luck., 215.

and (4) that it was due to a malicious intention of the defendant. It is not at all incumbent upon the plaintiff to prove that he was innocent of the charge upon which he was tried. But if, as in the present case, the defendant pleads that his complaint was true and leads evidence to substantiate it, the question of the truth or falsity of the complaint may arise at the instance of the defendant. And when such facts are professed to be within the knowledge of the defendant the question of the truth or falsity of the complaint may also determine the question of want of reasonable and probable cause. In our opinion the judgements of the criminal courts are conclusive for the purpose of showing that the prosecution terminated in favour of the plaintiff, but we doubt if the findings of the criminal courts by themselves are any evidence of the malice or want of reasonable and probable cause. It is for the civil court to go into all the evidence and decide for itself whether such malice or cause existed or not.

We accordingly allow this appeal and, setting aside the decree of the lower appellate court, remand this case to that court for disposal according to law. The plaintiffs will have their costs of this appeal, but the costs in the courts below will abide the event.

Appeal allowed

APPELLATE CRIMINAL.

Before Mr. Justice Mukerji and Mr. Justice King.

1928 May, 10.

EMPEROR *v.* BIHARI BHAR.*

Act No. VI of 1924 *(Criminal Tribes Act), sections* 20 *and* 22 *—Criminal Tribe—Member of, failing to report—Summary trial—Criminal Procedure Code, section* 260.

One Bihari Bhar was tried summarily by a Magistrate of the first class for an offence under "section 22 of Act VI of 1924," and was convicted and sentenced to three months' rigorous imprisonment. He appealed from jail, and the Sessions Judge acquitted him on the sole ground that the offence could not be tried summarily.

Held, on appeal by the Local Government against this order of acquittal, (1) that the Magistrate ought to have recorded specifically the precise offence, amongst those mentioned in section 22 of the Criminal Tribes Act, 1924, with which the accused was charged and of which he was convicted, (2) that the offence which the accused had committed was the omission to comply with clause (*b*) of division (c) of rule 8 framed by the Local Government under section 20 of the Act, and (3) that, as this offence was punishable with a maximum sentence of six months' rigorous imprisonment, the Sessions Judge was wrong in acquitting him merely because the trial was a summary one.

The Government Advocate (Pandit *Uma Shankar Bajpai*), for the Crown.

Babu *Satish Chandra Das*, for the respondent.

MUKERJI and KING, JJ. :—This is an appeal by the Local Government against the acquittal of one Bihari Bhar, son of Chauthi Bhar, of an offence under section 22, clause (2), sub-clause (*a*), of the Criminal Tribes Act, being Act No. VI of 1924.

*Criminal Appeal No. 289 of 1928, by the Local Government, from an order of Harish Chandra, Additional Sessions Judge of Benares at Jaunpur, dated the 21st of January, 1928.

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The opposite party, Bihari, was convicted by the learned Magistrate of the first class on the 13th of December, 1927. He appealed from jail, and the learned Sessions Judge acquitted him on the sole ground that the offence could not be tried summarily, and in summarily trying him the learned Magistrate made an error of law. In the result, the learned Judge acquitted Bihari, and having regard to the circumstance that Bihari had already been in jail for over a month he did not order a re-trial. The learned Government Advocate has argued that the offence with which Bihari was charged was an offence punishable with the maximum amount of six months' rigorous imprisonment and that, therefore, under section 260 of the Code of Criminal Procedure, the case was triable summarily. We find that the learned Magistrate did not specify clearly the offence with which Bihari was charged. He simply stated, against column 5 of the form in which summary convictions are recorded, "section 22 of Act VI of 1924". Section 22 of the Criminal Tribes Act is a large section and contains several portions. In the earlier portion, sub-section (1) deals with offences which are punishable with one and two and three years' rigorous imprisonment. The sub-section (2) deals with other kinds of offences, some of which are punishable only with six months' rigorous imprisonment. We have tried to find out what was the actual offence with which Bihari was charged, in order to find out what would be the appropriate clause of section 22 under which he should be charged, if the case was made out against him.

The evidence shows that Bihari, who was a registered member of a criminal tribe, left his house on the 22nd of November, 1927, and reported to Baldeo chaukidar that he was going to the village of Audiar, and was likely to stay there for the night. He also informed him that he was to stay at the house of Pancham Bhar at

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Audiar. We further find that Pancham denies that Bihari ever went to him or stayed with him for the night. The evidence of Deo Narain, the chaukidar of Audiar, is to the effect that Bihari accused did not report to him his arrival at the village of Audiar, if he did at all arrive there.

Under powers given to it by section 20 of the Act, the Local Government has framed certain rules, under clause (*d*) of that section, as to the manner in which registered members of a criminal tribe are to report themselves or notify their residence or any change or intended change of residence, or any absence or intended absence. Paragraph 8 of the rules so framed has three divisions, and the division (c) deals with absence and intended absence from residence. By clause (*b*) of this division (c) a registered member of a criminal tribe is required "to notify immediately after arrival at and immediately before his departure from any place at which he arrives or halts at night." The report is to be made to the chaukidar, or in his absence to the headman of the village. Even if Pancham is not to be believed, we have got the evidence of Deonarain to the effect that Bihari did not notify to him his arrival at the village of Audiar, supposing that he did arrive there. The offence, therefore, which Bihari did commit is the omission to comply with clause (*b*) of division of (c) of rule 8 framed by the Local Government.

Section 22 of the Criminal Tribes Act lays down that the contravention of any rule made under section 20 and not punishable by clause (1) of section 22 is to be punished, on a first conviction, with imprisonment for a term which may extend to six months. We find, therefore, that the offence which Bihari did commit is an offence punishable with the maximum sentence of six months' rigorous imprisonment. In this view, the offence was triable summarily by a Magistrate of the first class.

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It was argued before us that there is no sufficient material on the record to show that the notification under section 10 of the Criminal Tribes Act was issued by the Local Government. This is a point which was never taken before. On the other hand, we find that the Sub-Inspector swore that Bihari was "a registered member". We also find that Bihari was in the habit of reporting his absence from the village to the chaukidar. In this case he did make a report which was reported to the police-station by Baldeo. In the circumstances, we do not think that there is any reason to suppose that Bihari was a man with respect to whom a notification under section 10 of the Criminal Tribes Act had not been issued.

The acquittal of Bihari was wrong in law. It must be set aside. As regards the sentence, he has been in jail now for nearly three months. He was in jail partly as an under-trial prisoner, and partly as a convicted prisoner. In the circumstances, we do not think that we need send him back to jail.

We set aside the order of acquittal passed by the learned Sessions Judge on the 21st of July, 1928, and record an order of conviction. We direct that he be released at once, the sentence and punishment suffered by him being enough in the circumstances of the case.



PRIVY COUNCIL.

J. C.
1928
July, 2.

KISHAN SINGH *v.* THE KING-EMPEROR.

[On appeal from the High Court at Allahabad.]

Criminal Procedure Code, section 439 (4)—*Charge of murder —Conviction of culpable homicide—Revision—Jurisdiction on revision—Privy Council practice—Conviction by court without jurisdiction.*

The appellant was tried by a Sessions Judge on a charge of murder under section 302 of the Indian Penal Code. He was convicted under section 304 of culpable homicide not amounting to murder, there being power by section 238 (2) of the Code of Criminal Procedure so to convict him upon the charge under section 302; he was sentenced to five years' rigorous imprisonment. No acquittal of the charge under section 302 was recorded. The Local Government did not appeal, but applied for revision on the grounds that the appellant should have been convicted of murder, and that the sentence was inadequate. The High Court thereupon convicted the appellant of murder and sentenced him to death.

Held that the finding at the trial was to be regarded as an acquittal on the charge of murder, and that consequently section 439 (4) of the Code of Criminal Procedure precluded the High Court from having jurisdiction upon revision to convict on that charge; that though upon an appeal by the Local Government the High Court would have had before it the same materials, yet, the order having been made without jurisdiction, an injustice had been done to the appellant, bringing the case within the restricted jurisdiction exercised by the Judicial Committee in criminal matters; that the case should not be remitted to the High Court to consider whether the sentence on the conviction under section 304 should be enhanced, but that the order of that Court should be set aside and the order of the Sessions Judge restored.

* *Present* :—Lord HAILSHAM, L. C., Viscount HALDANE, Lord ATKIN, Sir JOHN WALLIS, and Sir LANCELOT SANDERSON.

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KISHAN SINGH v. THE KING-EMPEROR.

In re Bali Reddi (1), commented on; *Emperor* v. *Sheo Darshan Singh* (2), and *Emperor* v. *Shivputraya* (3), approved.

APPEAL (No. 49 of 1928) by special leave from an order of the High Court (October 31, 1927) on proceedings in revision, whereby the conviction of the appellant by the Sessions Court of the offence of culpable homicide not amounting to murder (under section 304 of the Indian Penal Code) was altered to a conviction of the offence of murder (under section 302), and the sentence of five years' rigorous imprisonment was altered to a sentence of death.

The facts and the material provisions of the Code of Criminal Procedure appear from the judgement of the Judicial Committee.

1928. June, 12. *Wallach* for the appellant:—The High Court had no jurisdiction to make the order appealed from. First, because the appellant had in effect been acquitted of the charge of murder, and by section 439 (4) of the Code of Criminal Procedure the High Court could not convert that finding into one of conviction: *Emperor* v. *Sheo Darshan Singh* (2). Secondly, because the Local Government could have appealed under section 417 of the Code; section 439 (5) consequently prevented any proceedings by way of revision from being entertained.

Dunne, K. C., and *Kenworthy Brown* for the respondent:—Section 439 (4) applies only where there has been a complete acquittal, otherwise the powers of the High Court on revision would be much cut down: *In re Bali Reddi* (1). It is submitted that the view taken in *Emperor* v. *Sheo Darshan Singh* (2) and *Emperor* v. *Shivputraya* (3) was erroneous. It is not material that

(1) (1913) I. L. R., 37 Mad., 119. (2) (1922) I. L. R., 44 All., 332.
(3) (1924) I. L. R., 48 Bom., 510.

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there was no appeal, because under section 439 the High Court had jurisdiction of its own motion to exercise all the powers given to a court of appeal. But even if the High Court had no jurisdiction to make the order, there has been no failure of justice, since upon an appeal the same results would have followed, and at the date of the revision proceedings the time for appealing had not expired. Consequently the present matter does not fall within the limited class of cases in which the Judicial Committee will inteffere in criminal proceedings. The High Court in any event had jurisdiction to enhance the sentence, the maximum punishment under section 304 of the Indian Penal Code being transportation for life. If, therefore, the Board consider that the order cannot stand, it is submitted that the case should be remitted to the High Court as in *Sayyapureddi* v. *The King-Emperor* (1).

Wallach replied.

July, 2. The judgement of their Lordships was delivered by Sir LANCELOT SANDERSON :—

By His Majesty's Order in Council, dated the 22nd of March, 1928, special leave to appeal against a judgement of the High Court of Judicature at Allahabad, dated the 31st of October, 1927, was granted to the appellant.

On the 18th of June, 1927, the appellant, Kishan Singh, was charged by a Magistrate of the First Class as follows :—

"That you on or about the 20th day of March, 1927, at Bharthwa did commit murder by intentionally causing the death of Kuber Singh and Shoran Singh and thereby committed an offence punishable under section 302 of the Indian Penal Code, and within the cognizance of the Court of Session. And I hereby direct that you be tried by the said court on the said charge."

He was tried on the said charge by the Additional Sessions Judge of Aligarh, with the aid of four assessors,

(1) (1920) I.L.R., 44 Mad., 297; L.R., 48 I. A., 35.

and on the 31st of July, 1927, the learned Judge delivered his judgement. He recited the finding of the assessors as follows :—

"All the assessors are unanimously of the opinion that the accused was guilty under section 304, Indian Penal Code, and in their opinion the story about the *rath* was a false one and the accused had shot down Kuber Singh as he had seen him cohabiting with his own wife. They were also of opinion that both Shoran Singh and Kuber Singh were shot by Kishan Singh with his gun and the *gandasa* story was a got-up one and the *gandasa* was never used by the accused in order to kill Shoran Singh. They were also of the opinion that in the struggle which ensued between Kishan Singh and Shoran Singh the gun went off and shot Shoran Singh."

The learned Judge concluded his judgement by saying :—

"Agreeing with all the assessors I find the accused guilty under section 304, Indian Penal Code, for committing both the said murders. I sentence him to three years' rigorous imprisonment for the murder of Kuber Singh under section 304, Indian Penal Code, and I sentence him to five years' rigorous imprisonment for the murder of Shoran Singh with his gun under section 304, Indian Penal Code, both the sentences to run concurrently."

Although the learned Judge in the above-mentioned part of his judgement spoke of the "murder of Kuber Singh" and "the murder of Shoran Singh," it is clear that the sentence was passed under section 304 of the Indian Penal Code. That section deals with culpable homicide not amounting to murder, and it must, therefore, be taken for the purposes of this appeal that the offence of which the appellant was found guilty by the learned Judge was culpable homicide not amounting to murder.

The charge, as already stated, was that the appellant had committed an offence punishable under section 302 of the Indian Penal Code, viz., murder.

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It is, however, provided by section 238 (2) of the Code of Criminal Procedure that when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

It was, therefore, legitimate for the learned Judge to convict the appellant of the offence punishable under section 304 of the Indian Penal Code, viz., culpable homicide not amounting to murder, although there was no charge in respect of that offence framed against the appellant.

The learned Judge did not record an express finding of acquittal in respect of the charge of murder, but their Lordships are of opinion that the conclusion at which the learned Judge arrived amounted to an acquittal in respect of that charge.

The only charge framed against the appellant was one of murder; he certainly was not convicted of murder. On the contrary, he was found guilty of culpable homicide not amounting to murder.

The appeal, therefore, must be decided upon the assumption that the appellant was acquitted of the charge of murder, and that he was convicted of the offence punishable under section 304 of the Indian Penal Code.

On the 23rd of September, 1927, the Government Advocate, on behalf of the Local Government, filed an application for revision of the judgement of the learned Additional Sessions Judge of Aligarh.

The grounds of the application were as follows :—

(1) That on the evidence the accused should have been convicted under section 302, Indian Penal Code.

(2) That the sentence passed on the accused is inadequate.

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The application concluded as follows:—

"It is, therefore, prayed that the conviction be allowed and the sentence passed on the accused be enhanced."

The learned counsel, who appeared for the respondent, argued that the word "altered" should be read instead of the word "allowed," whereas the learned counsel for the appellant suggested that the word "revision" should be read instead of the word "conviction."

It is not necessary to consider this matter further, for their Lordships are of opinion that, having regard to the terms of the first ground, there is no doubt but that the main object of the application for revision was to obtain a conviction of the accused in respect of the offence punishable under section 302 of the Indian Penal Code, viz., murder.

The application for revision was decided by the High Court of Judicature at Allahabad on the 31st of October, 1927.

The learned Judges, having considered the evidence, came to the conclusion that there had been a miscarriage of justice in the trial court. They accepted the application and directed that the conviction of the appellant, Kishan Singh, should be altered to a conviction under section 302 of the Indian Penal Code, and they sentenced him to death.

The main argument on which the learned counsel for the appellant relied was that the appellant had been acquitted by the trial Judge of the charge of murder, that the Local Government had not appealed from the acquittal of the appellant in respect of that charge, as they might have done under section 417 of the Code of Criminal Procedure, 1898, that inasmuch as the Local Government had not appealed against the said acquittal,

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the learned Judges of the High Court should not have entertained the application for revision at the instance of the Local Government, and that in any event, if it was open to the High Court to entertain the application for the purpose of enhancing the sentence in respect of the offence punishable under section 304 of the Indian Penal Code, of which the appellant had been convicted, the learned Judges had no jurisdiction to convert the finding of acquittal on the charge of murder into one of conviction.

As already stated, their Lordships are of opinion that the appellant was acquitted by the learned Judge who tried the case, in respect of the charge of murder.

They are further of opinion that the Local Government could have appealed to the High Court against that acquittal in pursuance of the provisions of section 417 of the Code of Criminal Procedure.

It is clear that the Local Government did not appeal against the acquittal.

The procedure adopted by the Local Government was to present an application for revision.

The sections of the Code of Criminal Procedure, which are material to the application for revision, are 435 (1) and 439 (1), (4) and (5).

Section 435 (1) relates to the power to call for records of inferior courts and is as follows :—

"435. (1) The High Court or any Sessions Judge or District Magistrate or any Sub-divisional Magistrate empowered by the Local Government in this behalf, may call for and examine the record of any proceeding, before any inferior Criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court and may, when

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calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record."

Section 439 relates to the High Court's powers of revision and sub-sections (1), (4) and (5) are as follows :—

"439. (1) In the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 423, 426, 427 and 428 or on a Court by section 338, and may enhance the sentence; and when the Judges composing the court of revision are equally divided in opinion, the case shall be disposed of in manner provided by section 429.

(4) Nothing in this section applies to an entry made under section 273, or shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction.

(5) Where, under this Code, an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed."

Their Lordships are of opinion that in view of the provision contained in section 439, sub-section (4)—that nothing in that section shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction—the learned Judges of the High Court, who were dealing only with the application for revision, had no jurisdiction to convert the learned trial Judge's finding of acquittal on the charge of murder into one of conviction of murder.

Their Lordships' attention was drawn to a decision of the Madras High Court in *In re Bali Reddi* (1), in which, amongst other matters, it was decided that section 439, sub-section (4), must be construed as referring to

(1) (1913) I. L. R., 37 Mad., 119.

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cases where the trial has ended in a complete acquittal. The reason of that decision was that any other construction would be inconsistent with the power to "alter the finding" given to the Court as a court of revision by virtue of its power to exercise the powers conferred on a court of appeal by section 423(*b*).

It should be noted that the facts of the cited case are different from the facts of the present case, inasmuch as in the Madras case the accused had appealed to the High Court against their conviction under sections 147 and 304 of the Indian Penal Code, and the High Court, as a court of revision, had given them notice to show cause why they should not be convicted of murder and be sentenced for that offence.

It is not necessary on the present occasion for their Lordships to express any opinion whether the facts of the cited case would justify the decision at which the learned Judges arrived. Their Lordships, however, do think it necessary to say that if the learned Judges of the High Court of Madras intended to hold that the prohibition in section 439, sub-section (4), refers only to a case where the trial has ended in a complete acquittal of the accused in respect of all charges or offences, and not to a case such as the present, where the accused has been acquitted of the charge of murder, but convicted of the minor offence of culpable homicide not amounting to murder, their Lordships are unable to agree with that part of their decision. The words of the sub-section are clear and there can be no doubt as to their meaning. There is no justification for the qualification which the learned Judges in the cited case attached to the sub-section.

The High Court of Allahabad, in the case of *Emperor* v. *Sheo Darshan Singh* (1), decided in 1922, and the

(1) (1922) I. L. R., 44 All., 332.

High Court of Bombay in the case of *Emperor* v. *Shivputraya* (1), decided in 1924, dealing with the provisions of section 439 (4), arrived at a conclusion contrary to that of the Madras High Court in the case hereinbefore cited.

The head-note of the Allahabad case is as follows :—

"An accused person was charged with both murder and culpable homicide not amounting to murder. He was acquitted on the former charge and convicted on the latter. On a perusal of the sessions statement, notice was sent to the accused to show cause why he should not be convicted of murder and punished accordingly.

"*Held*, on return of the notice, that the High Court had no power, except through the medium of an appeal on behalf of the Local Government, to convert the acquittal into a conviction."

The learned Judges in giving judgement said as follows :—

"We cannot, however, change the conviction into a conviction for murder. Sheo Darshan Singh was acquitted by the Sessions Judge of the offence of murder and we cannot in revision convert a finding of acquittal into one of conviction. The only method by which it would be possible to obtain a conviction of murder would be by an appeal by the Government against the acquittal."

Their Lordships are of opinion that the above is a correct statement of the law; it is indeed no more than a repetition of the provisions of the material sections of the Code of Criminal Procedure.

It was contended further by the learned counsel for the respondent that it was open to the High Court to entertain the application for revision at all events so far as it was an application that the sentence passed upon the appellant in respect of the offence, of which he had been convicted, should be enhanced; and he asked their Lordships to remit the case to the High Court of Allaha-

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bad in order that the application that the sentence in respect of the offence under section 304, Indian Penal Code, should be enhanced, might be heard and disposed of.

Their Lordships do not express any opinion on the facts of this case, or upon the decisions arrived at by the two courts in India in respect thereof, or upon the adequacy of the sentence passed upon the appellant by the learned Judge who tried the case.

In the circumstances of this case, however, their Lordships have come to the conclusion that it would not be right to remit it to the High Court for further consideration solely upon the question whether the sentence in respect of the offence, of which the appellant was convicted, should be enhanced.

Finally, it was urged by the learned counsel on behalf of the respondent that even though the learned Judges of the High Court had no jurisdiction on the application for revision to convert the order of acquittal on the charge of murder into one of conviction, there had been no injustice done to the appellant, for the Local Government could have appealed to the High Court against the acquittal, that the time for appealing had not expired, and that the High Court upon such appeal would have had before it the same materials as were before the Court on the application for revision, and the appellant could and would have been convicted of murder.

Their Lordships cannot accept that argument. They are of opinion that the learned Judges of the High Court, in converting the finding of acquittal of the appellant on the charge of murder into one of conviction, and in sentencing him to death on the application for revision, were acting without jurisdiction, and in such circumstances it is impossible to hold that no injustice was done.

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Their Lordships are of opinion that this case comes within the exception to the rule stated in the judgement of Lord WATSON in *In re Dillet* (1).

This appeal, therefore, should be allowed, the judgement and order of the High Court should be set aside, and the judgement and order of the learned Additional Sessions Judge should be restored, and their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellant: *H. S. L. Polak.*

Solicitor for respondent: *Solicitor, India Office.*

APPELLATE CIVIL.

Before Mr. Justice Lindsay and Mr. Justice Banerji.

SIBT AHMAD AND ANOTHER (DEFENDANTS) *v.* AMINA KHATUN (PLAINTIFF)*

1928 *February* 24

Muhammadan law—Shias—*Marriage*—Shia *girl married to a* Sunni—*Consent of bride*—*Presumption as to age of puberty*—*Guardian* ad litem—*Costs.*

According to the Muhammadan law applicable to the *Shia* sect, a girl is of full age when she attains the age of puberty, and, in the absence of direct evidence, there is a presumption that that event would occur between the ages of nine and ten years.

Where, therefore, a *Shia* girl of the age of nearly thirteen years was married, with the consent of her father, but without her own, to a boy who was a *Sunni*, and, before she attained the age of twenty-one years, she sued to have the marriage declared illegal and not binding on her, it was *held* that she was entitled to the decree asked for: the consent of the father could not in the circumstances take the place of the consent of the girl herself. *Newab Mulka Jehan Sahiba* v. *Mahomed Ushkurree Khan* (2), followed.

* First Appeal No. 497 of 1926, from a decree of Iftikhar Husain, Subordinate Judge of Budaun, dated the 12th of July, 1926.

(1) (1887) 12 App. Cas. 459 (467. (2) (1873) 26 W. R. (C. R.), 26.

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There is no authority in the Code of Civil Procedure to award costs personally against a guardian *ad litem*. *Narasimha Rau* v. *Lakhsmipati Rau* (1), followed.

THE facts of this case are fully stated in the judgement of the Court.

Mr. *R. S. Pandit* and Munshi *Sarkar Bahadur Johari*, for the appellants.

Mr. *A. M. Khwaja*, Mr. *T. A. K. Sherwani* and Mr. *Mahmud-ullah*, for the respondent.

LINDSAY and BANERJI, JJ.:—The suit which has given rise to this appeal was brought by a Muhammadan lady, Bibi Amina Khatun, in order to obtain a declaration that a ceremony of *nikah* which is said to have taken place on the 22nd of September, 1917, between her and the first defendant, Sibt Ahmad, was not lawful and binding and that the relation of husband and wife did not exist between the first defendant and herself.

The first defendant, Sibt Ahmad, was impleaded as a minor under the guardianship of his grandfather, Wazir Ahmad.

The second defendant impleaded in the suit was Maulvi Qasim Hasan, who is the father of the plaintiff. He was a *pro formâ* defendant.

In substance the defence to the suit was that the ceremony of *nikah* which had taken place between the plaintiff and the first defendant was a valid ceremony, and that the plaintiff was not entitled to the declaration sought. The Subordinate Judge gave a decree in favour of the plaintiff.

Before we go on to discuss the issues which have to be determined in this appeal, we think it proper to say something of the history of the family to which the parties belong.

Wazir Ahmad, who appears in this litigation as the guardian *ad litem* of the minor defendant Sibt Ahmad,

(1) (1881) I. L. R. 3 Mad., 263.

had two sons, Qasim Hasan the elder, who is the father of the plaintiff, and Ibn Ahmad, the younger, who is now dead. It is admitted that the plaintiff, Amina Khatun, was born on the 24th of November, 1904, and consequently at the time this *nikah* took place in September, 1917, she was close on 13 years of age. Amina Khatun had a brother named Abdul Hafiz who is said to have died in or about the year 1919 or 1920.

It is admitted that before September, 1917, Wazir Ahmad had totally disinherited his son Qasim Hasan, the father of the plaintiff, by making a gift of all his property to his younger son Ibn Ahmad. According to what is set out in the written statement this gift was made because Wazir Ahmad was displeased with what is called the "misconduct and highhandedness" of his elder son. We have no particulars of this misconduct, but we can have little doubt after a perusal of the oral and documentary evidence in this case that Wazir Ahmad was led principally to execute this deed of gift because his son Qasim Hasan was married to a *Shia* lady. Wazir Ahmad himself is a rigid *Sunni* to whom the *Shia* creed is obviously abhorrent. This is made plain from some of the correspondence on record. It is also equally clear that Qasim Hasan's wife, Musammat Ashraf Bano, is a staunch *Shia* and that she and her father-in-law have never been on good terms.

We have also proof upon the record that Wazir Ahmad was anxious about the faith of the two children of Qasim Hasan. There can, we think, be no doubt that it was his desire that they should be brought up as *Sunnis*. Abdul Hafiz, the son of Qasim Hasan, disappointed this hope, declaring himself to be a *Shia* some time in 1916 or 1917, at a time while his father Qasim Hasan was employed as a Deputy Collector at Fyzabad.

Having totally deprived Qasim Hasan of his right to inherit any of his property, it seems to have occurred to

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Wazir Ahmad to repair what he had done by arranging two marriages, namely, one between the plaintiff and Sibt Ahmad, the son of Ibn Ahmad, and the other between Qasim Hasan's son, Abdul Hafiz, and Musammat Zohra, the daughter of Ibn Ahmad, and there can be no doubt that proposals to this effect were made both to Qasim Hasan and to Ibn Ahmad. Certain correspondence which is on the record, bearing date June, 1917, shows how these negotiations went on and shows that at that time Qasim Hasan was most unwilling to give his daughter in marriage to Sibt Ahmad; it further appears that his wife was very strongly opposed to any such union.

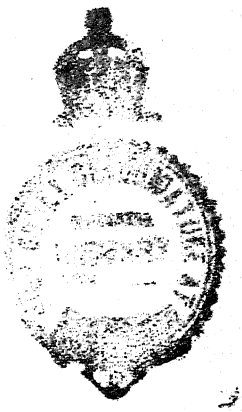
Qasim Hasan has been examined in this case, and from his own statement and from what appears from the letters which were written by him he was evidently between two fires at the time mentioned above. He was, we think, anxious about the property, that is to say, he wanted, if he could, to put his children in the way of succeeding to some of the property which had been gifted away by Wazir Ahmad to his younger son, Ibn Ahmad. On the other hand, his letters disclose that he was anxious for the happiness of his daughter. One objection which he had to the marriage was on the ground of disparity of age. He pointed out that the girl was between 5 and 6 years older than Sibt Ahmad.

However reluctant Qasim Hasan was in June, 1917, to allow a marriage to take place between his daughter and the first defendant, it appears that before the month of September, 1917, he was won over by the solicitations of his father and became willing to allow the double marriage to take place, that is to say, the marriage between the plaintiff and Sibt Ahmad and the other marriage between his son Abdul Hafiz and the daughter of Ibn Ahmad, called Musammat Zohra. The result of all

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this was that in September, 1917, the two brothers, Qasim Hasan and Ibn Ahmad, with their families proceeded to the family house at Budaun where they arrived on the 22nd of September. On the night following their arrival, that is to say, the 23rd (not the 22nd as stated in the pleadings) a ceremony of *nikah* was performed as between the plaintiff Amina Khatun and Sibt Ahmad. The other proposed *nikah*, for which also preparations seem to have been made at the same time, was put off on the allegation that Abdul Hafiz was then not of sufficiently good character.



[After further consideration of the circumstances of the family and the religion to which Amina Khatun, the plaintiff, belonged at the time of the *nikah* ceremony in September, 1917, the judgement continued :—]

Having considered the circumstances of the case and the probabilities we are of opinion that the Subordinate Judge was entitled to find that the plaintiff was a *Shia* before the *nikah*. We have no doubt that the Subordinate Judge's finding on this matter is correct.

We have, therefore, to apply the *Shia* law in order to ascertain whether this ceremony of marriage, which was performed in September, 1917, is binding on the plaintiff. That the ceremony was performed is a matter which is not denied.

The next matter to be determined is whether at the time of the *nikah* the girl was of full age, that is to say, had she attained the age of puberty, and if she had attained that age what would be the effect of her father representing her as guardian at the ceremony of *nikah*? There can be no doubt that Qasim Hasan did give sanction on behalf of the girl to the marriage, but the Subordinate Judge has found that no sanction was obtained from the girl herself. There is clear evidence on the record that her permission (*Izn*) was not asked before the ceremony was carried through. We have therefore to consider what is the *Shia* law relating to the age of

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puberty. The Subordinate Judge has stated that in the case of *Shias* the age of puberty begins with menstruation and under the *Shia* law the presumption is that menstruation takes place between the age of nine and ten years. There seems to be no doubt that this is the law as laid down in the *Sharaya-ul-Islam*. We might also refer in this connection to a case which was decided by their Lordships of the Privy Council in the year 1873, the case of *Newab Mulka Jehan Sahiba* v. *Mahomed Ushkurree Khan* (1). If, therefore, there were no evidence of age in the case it would, under this law, be presumed that Musammat Amina Khatun had attained the age of puberty long before this *nikah* took place. We know the age of the girl definitely. She was, as we have said, born on the 24th of November, 1904, and, therefore, she was all but 13 years of age when the *nikah* took place.

The Subordinate Judge has made a careful analysis of certain direct evidence bearing upon this point. The plaintiff herself, her father, her mother and a *hakim* named Fazal-ur-Rahman, all say that menstruation had begun before the year 1917. As against this the defendants put forward the statement of another *hakim* named Fuzail Ahmad. We agree with the Subordinate Judge that this man's evidence is of no value. Over and above this all, we think it is in accordance with probabilities that the girl should have begun to menstruate before September, 1917. There is the authority of works on medical jurisprudence. We may refer to the new edition of Lyons' Jurisprudence, edited by Mody, in which it is said that the rule in India is that girls begin to menstruate between the ages of 12 and 14. Having regard therefore to all circumstances, we are of opinion that this girl had attained puberty before September, 1917.

There being no pretence that her consent to the marriage was formally asked for before the ceremony

(1) (1873) 26 W. R. (C. R.), 26.

took place, the presumption would be that the *nikah* was invalid and does not bind the plaintiff. It was argued, however, in the court below and has been argued here that although the girl may not have given any formal consent to this marriage, nevertheless her subsequent conduct amounts to evidence that she accepted the marriage and ought to be deemed a consenting party. In this connection the Subordinate Judge has entered upon a long discussion regarding the nature of the consent which was given by the girl's father. He has come to the conclusion that Qasim Hasan was deceived into agreeing to this marriage by a promise made to him by Wazir Ahmad that in the event of the marriage taking place half of the property which had been given away to Ibn Ahmad would be restored to him, Qasim Hasan. We think any discussion of this question is really superfluous, because if the girl had become adult at the time of the *nikah* the consent of her father could not take the place of her own consent which under the *Shia* law is essential.

We have, therefore, to consider whether there is before us any reliable evidence from which it could reasonably be inferred that Amina Khatun assented to this marriage.

In the plaint it was stated that it was only $2\frac{1}{2}$ years before the suit was brought that Amina Khatun came to have knowledge that any ceremony of *nikah* had been performed. The Subordinate Judge has disbelieved this part of the case and we disbelieve it, too. We are quite prepared to believe that the girl and her mother remained for a few weeks in the house of Wazir Ahmad after this *nikah* had taken place and we cannot for a moment believe that either the girl or her mother were ignorant that such a ceremony had been performed. But while we are prepared to go so far, we are not prepared to hold that any conduct of the girl can be pointed to so as to

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justify the conclusion that she ever gave her consent or was willing to be married to the first defendant. The fact that she and her mother remained or were detained in the house of Wazir Ahmad for a fortnight after the ceremony took place is no evidence whatever that she was a willing party to the marriage.

Then we are referred to what took place in Allahabad in the month of December, 1917, and January, 1918. We have already referred to the events of that time, and have stated how it is proved that the plaintiff and her mother were brought to Allahabad to the house of Ibn Ahmad very much against their will.

[The judgement, after referring to certain evidence, continued :—]

Our conclusion is that it is impossible for us to find that any conduct of the plaintiff during the period just referred to affords any indication of her acceptance of the position of being the married wife of Sibt Ahmad.

We have already pointed out that after February, 1918, the girl went off with her father to Hyderabad and we have no evidence of any conduct during the period between her going to Hyderabad and the time the suit was brought which would indicate that she was a consenting party to the marriage. It is true of course that the girl did not during this time take any active steps for the purpose of repudiating the validity of the *nikah* and it has been argued that in view of the great delay in bringing the suit the relief sought by her ought to be refused, it being within the discretion of the court to withhold such relief. On the other hand, there is the consideration that the girl all this time was living with her father and in the circumstances it is not to be expected that she could have taken any action independent of him.

The letters from Qasim Hasan to his father written from Hyderabad indicate that he was still trying to

establish friendly relations between his father and himself and for that purpose he was representing that the plaintiff was being taught the *Sunni* faith. It would in our opinion, have been quite impossible for this girl to have taken any active steps at an earlier stage in order to obtain the declaration she is seeking in this suit. It is likely enough that the suit was brought after Qasim Hasan had quarrelled again with his father and had made a *wakf* of the property to which he claimed to be entitled as an heir of his deceased mother. However that may be, we are of opinion that the record does not afford any reliable evidence to show that Amina Khatun was ever willing to marry the first defendant or has ever been willing since the ceremony was performed to acknowledge that she is lawfully wedded to him. We have come therefore to the conclusion that the Subordinate Judge's judgement and decree must be maintained, except in one particular now to be noticed. The Subordinate Judge in decreeing the plaintiff's suit made Wazir Ahmad, the guardian *ad litem* of the first defendant, personally liable for the costs of the suit. It is complained in the memorandum of appeal that the court below was wrong in awarding costs personally against Wazir Ahmad. We think effect must be given to this plea. We cannot find any authority in the Code of Civil Procedure to award costs personally against a guardian *ad litem*, and we may refer in this connection to a decision of the Madras High Court, *Narasimha Rau* v. *Lakshmipati Rau* (1).

The decree of the court below, therefore, will be varied by directing that the costs of the suit will be borne by the first defendant. With this modification in the decree of the court below we dismiss this appeal with costs to the plaintiff respondent.

Appeal dismissed.

(1) (1881) I. L. R., 3 Mad., 263.

Before Mr. Justice Ashworth and Mr. Justice Iqbal Ahmad.

1928
February, 28

RAM SARAN AND ANOTHER (PLAINTIFFS) *v.* ABDUL GHAFFAR AND ANOTHER (DEFENDANTS).*

Civil Procedure Code, order XXXIV, rule 1—Mortgage—Several mortgages held by same mortgagee over same property—Right to sue on the mortgages independently of each other.

Per IQBAL AHMAD, J. :—In view of the provisions of order XXXIV, rule 1, of the Code of Civil Procedure it is open to a subsequent mortgagee to put his mortgage into suit without impleading the prior mortgagee. That being so, it is open to a person holding two mortgages over the same property to put his second mortgage into suit without claiming to enforce his first mortgage, provided he expressly declares his intention of reserving his rights as a prior mortgagee and claims to sell the property in enforcement of the second mortgage subject to his rights as a prior mortgagee.

Per ASHWORTH, J. :—Where a person holds two mortgages over the same property, he cannot sue on the first mortgage alone without foregoing the second mortgage. He can, however, sue and sell on a second mortgage provided that he declares the existence of a first mortgage and has it entered in the sale proclamation. If he does not do so, then he must be deemed to have foregone the first mortgage.

Sundar Singh v. *Bholu* (1), *Mata Din Kasodhan* v. *Kazim Husain* (2), and *Ram Shankar Lal* v. *Ganesh Prasad* (3), referred to.

THE plaintiffs held four mortgages over the same property. They put the last mortgage into suit and obtained a decree. In suing on the last mortgage they disclosed the existence of the previous mortgages and prayed for sale of the mortgaged property subject to these incumbrances. A decree was passed in their favour and in execution thereof the property in dispute along with some other property was sold

* Second Appeal No. 1938 of 1925, from a decree of E. T. Thurston, District Judge of Budaun, dated the 11th of November, 1925, reversing a decree of Rup Kishen Agha, Subordinate Judge of Budaun, dated the 30th of August, 1924.

(1) (1898) I. L. R., 20 All., 322. (2) (1891) I. L. R., 13 All., 432.
(3) (1907) I. L. R., 29 All., 385.

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and was purchased by defendant No. 2. The plaintiffs then brought the present suit for enforcement of one of the earlier mortgages. The trial court held that they were entitled to a decree for sale of the property purchased by defendant No. 2 in terms of the relief prayed for in the plaint. On appeal the lower appellate court agreed with the findings of the trial court on all points but one. It held that the plaintiffs were not entitled to sell the property in dispute a second time in enforcement of their prior mortgage, and, therefore, were not entitled to get a decree against the contesting defendant (No. 2). The court accordingly reversed the decree of the trial court and dismissed the plaintiffs' suit.

The plaintiffs appealed to the High Court.

Babu *Piari Lal Banerji* and Pandit *Narmadeshwar Prasad Upadhiya*, for the appellants.

Mr. *Akhtar Husain Khan*, for the respondents.

IQBAL AHMAD, J.—This appeal must be allowed and the decision of the trial court must be restored. There is nothing in law to prevent a person holding two independent mortgages over the same property from putting the subsequent mortgage into suit first and then bringing a second suit on the basis of the first mortgage held by him, provided that while bringing a suit on the basis of the second mortgage he proclaimed the existence of the first mortgage over the property mortgaged. If a mortgagee having two mortgages over the same property puts the later mortgage into suit and discloses the existence of the first mortgage and obtains a decree on the basis of the second mortgage for sale of the property subject to the prior mortgage, and that decree is put into execution and the property is sold subject to the prior mortgage, the auction-purchaser purchases the property subject to the first mortgage, and it is not open to him to resist a suit for sale on the basis of the first mortgage on

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the ground that the property once having been sold in execution of the decree obtained by the mortgagee on the basis of the second mortgage is not liable again to be sold in execution of the decree obtained on the basis of the first mortgage. The proposition of law enunciated above finds support from the Full Bench decision of this Court in *Sundar Singh* v. *Bholu* (1). It is to be noted that the observation of the learned Judges in that case, that "one thing is quite clear, that the plaintiffs cannot sell the property twice over, and they cannot sell under the second decree subject to the first", can not now be held to be good law inasmuch as that observation was based on the Full Bench decision of this Court in *Mata Din Kasodhan* v. *Kazim Husain* (2), and the binding nature of that decision has been taken away by the later Full Bench decision of this Court in *Ram Shankar Lal* v. *Ganesh Prasad* (3). In view of the provisions of order XXXIV, rule 1, of the Code of Civil Procedure, it cannot be doubted that it is open to a subsequent mortgagee to put his mortgage into suit without impleading the prior mortgagee. That being so, it is open to a person holding two mortgages over the same property to put his second mortgage into suit without claiming to enforce his first mortgage, provided he expressly declares his intention of reserving his rights as a prior mortgagee and claims to sell the property in enforcement of the second mortgage subject to his rights as a prior mortgagee.

In the suit giving rise to the present appeal it was agreed in the courts below that the plaintiff had four mortgages over the property in dispute. He put the last mortgage into suit and obtained a decree. In suing on the last mortgage he had disclosed the existence of the previous mortgages and prayed for sale of the property subject to the incumbrances evidenced by those

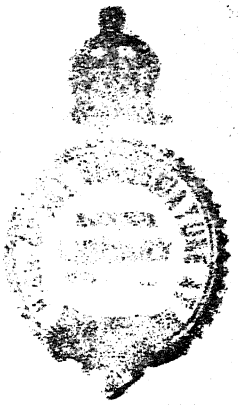
(1) (1898) I. L. R., 20 All., 322. (2) (1891) I. L. R., 13 All., 432.
(3) (1907) I. L. R., 29 All., 285.

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mortgages. A decree was eventually passed in his favour and in execution of that decree the property in dispute along with some other property was sold subject to the prior mortgages. The property in dispute was purchased by defendant No. 2 who is the contesting respondent before us. Then the plaintiff brought the suit giving rise to the present appeal for enforcement of an earlier mortgage held by him. The trial court held that he was entitled to a decree for sale of the property purchased by the contesting respondent in terms of the reliefs prayed for in the plaint.



The lower appellate court agreed with the findings of the trial court on all points except one. It held that the plaintiff was not entitled to sell the property in dispute a second time in enforcement of his prior mortgage and as such was not entitled to get a decree against the contesting respondent. In view of this finding the lower appellate court reversed the decree of the trial court and dismissed the plaintiff's suit.

I have given my reasons for disagreeing with the view of law taken by the lower appellate court and for agreeing with the trial court in holding that the plaintiff is entitled to get a decree for sale of the property purchased by the contesting respondent and to enforce the decree by sale of the property in his hands.

The other points on which the suit of the plaintiff was resisted by the contesting respondent in the courts below were found against him by both the courts below and the findings of those courts have not been assailed in argument before us.

The result is that I would allow the appeal, set aside the decree of the lower appellate court and restore the decree of the trial court with costs in all courts.

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ASHWORTH, J. :—I concur, but I would like to point out the present effect of the decision in *Sundar Singh* v. *Bholu* (1). That decision was to the following effect :—

"The holder of two independent mortgages over the same property, who is not restrained by any covenant in either of them, may obtain a decree for sale on each of them in a separate suit."

It was expressed in the same judgement as an *obiter dictum* that, if two such separate decrees were obtained, the decree-holder could not sell the property twice over. The reason for the latter opinion was clearly the decision in *Mata Din Kasodhan* v. *Kazim Husain* (2) that what is sold must be the property itself and not the equity of redemption.

The case of *Sundar Singh* v. *Bholu* is no longer, in my opinion, good authority for holding that the holder of two mortgages can sue on his first mortgage without disclosing the second, or even if he discloses the second, can put the property up for sale on the first mortgage without foregoing all his rights under the second mortgage. That may have been good law at the time when the decision was passed, but it ceases to be good law by reason of the provision of rule 1 of order XXXIV, which while it allows a second mortgagee to sue on his mortgage without joining the first mortgagee as party, on the other hand does not allow the first mortgagee to sue without joining the second mortgagee. The *obiter dictum* no longer holds good. It relied upon *Mata Din Kasodhan's* case which has been overruled by the Full Bench decision in *Ram Shankar Lal* v. *Ganesh Prasad* (3). In that decision it is held that the words "mortgaged property," as used throughout Chapter IV of the Transfer of Property Act, means the interest in specific immovable property which the mortgagor professes to

(1) (1898) I. L. R., 20 All., 322. (2) (1891) I. L. R., 13 All., 432.
(3) (1907) I. L. R., 29 All., 385.

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transfer, whatever that interest may be. It follows that the equity of redemption may be sold apart from the corporeal property. It is to be observed that none of the decisions quoted apply to a case where the holder of two mortgages sues on the second mortgage without disclosing the first mortgage. In such a case, in my opinion, it should be held that he is estopped from pleading that what was sold was a mere equity of redemption if he allows the sale proclamation to be issued as if the actual property and not merely the equity of redemption was being sold. In such a case the holder of two mortgages suing on the second mortgage occupies a different position to the holder of a second mortgage where a different person is the holder of a first mortgage. In the latter case a purchaser is put on his guard to see what property is sold. When one person is holder of both the mortgages and sells the property under the second mortgage without any mention of his own prior incumbrance, the purchaser is entitled to treat the sale proclamation as an assurance by the mortgagee that he, the mortgagee, has no prior incumbrance over the property.

Ashworth, J.

The state of the law then appears to me to be this. Where a person holds two mortgages over the same property, he cannot sue on the first mortgage alone without foregoing the second mortgage. He can, however, sue and sell on a second mortgage provided that he declares the existence of a first mortgage and has it entered in the sale proclamation. If he does not do this, then he must be deemed to have foregone the first mortgage.

BY THE COURT.—The appeal is allowed, the decision of the lower appellate court is set aside and that of the court of first instance restored. Costs here and in the court below will be paid by the defendants to the plaintiffs.

Appeal allowed.

Before Mr. Justice Sulaiman and Mr. Justice Kendall.

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March 1.

QADRI JAHAN BEGAM (PLAINTIFF) *v.* FAZAL AHMAD (DEFENDANT.)*

Civil Procedure Code, order XXIII, rules 1 *and* 3—"*Lawful agreement*"—*Compromise effected during pendency of appeal before High Court—Undue influence—Inherent powers of High Court.*

A suit by a wife against her husband for recovery of her dower-debt was dismissed. Plaintiff appealed to the High Court. Pending the appeal, the parties entered into an agreement in pursuance of which a joint application was made to the trial court stating that the parties had agreed that the suit should be dismissed and asking that the application for compromise should, after due verification, be forwarded to the High Court, so that the appeal might be dismissed in terms of it. The application, after verification by the plaintiff through the munsarim of the court, was sent to the High Court, but before any decree could be passed the plaintiff appellant died, and her heirs were brought upon the record.

Held, on objection taken by the respondent that the appeal could not be proceeded with,—(1) that rule 3, and not rule 1, of order XXIII, of the Code of Civil Procedure was applicable; (2) that the word "lawful" in rule 3 referred to agreements which in their very terms or nature were not "unlawful" and, therefore, might include agreements which were voidable at the option of one of the parties on the ground of undue influence, coercion or fraud: *Nand Lal* v. *Ram Sarup* (1), dissented from; *Budhu Mal* v. *Rup Kour* (2), and *Ala Bakhsh Khan* v. *Kasim Ali Khan* (3), referred to; (3) that although it might be open to the Court, under section 151 of the Code of Civil Procedure, to refuse to record a compromise brought about by undue influence, yet where the person said to have been subjected to undue influence did not repudiate the compromise in her life time and the determination of the question of undue influence would have involved an elaborate and lengthy inpuiry, the Court did not

*First Appeal No. 427 of 1924, from a decree of Gauri Prasad, Subordinate Judge of Pilibhit, dated the 5th of July, 1924.

(1) (1927) A. I. R., Lahore, 546. (2) (1890) P. R., No. 81, p. 254.
(3) (1895) P. R., No. 48, p. 203.

consider it necessary to exercise its extraordinary powers under section 151 of the Code. *Sreemati Sabitri Thakurain* v. *Savi* (1), and *Gajendra Singh* v. *Durga Kunwar* (2), referred to.

THE facts of the case are fully stated in the judgement of the Court.

Mr. Haider Mehdi, for the appellant.

Maulvi *Iqbal Ahmad* and Mr. *Muhammad Husain*, for the respondent.

SULAIMAN and KENDALL, JJ. :—This appeal arises out of a suit for recovery of a dower debt brought by Musammat Qadri Jahan Begam against her husband Sheikh Fazal Ahmad. The suit was dismissed by the court below on the ground that it was not proved that any part of the dower debt was prompt and accordingly the suit was premature. An appeal was preferred by the wife and was pending in this Court. Apparently some registered document was executed, purporting to be a compromise (we are not concerned with its terms here), on the basis of which an application was made to the Subordinate Judge, signed by both the parties to this appeal, to the effect that they had agreed that the suit should be dismissed without any further adjudication and that the parties were to bear their own costs. A request was made to the court below that "the said application for compromise, after due verification, be forwarded to the High Court so that the appeal may be dismissed in terms of it". The learned Subordinate Judge deputed his munsarim to get this application for compromise verified by the lady. This was done. He accordingly forwarded it together with the verification and his report. Before any decree could be passed in terms of it the counsel for the appellant intimated that the appellant was dead, and asked for time to bring her heirs on the record. An

(1) (1926) I. L. R., 6 Pat., 103. (2) (1925) I. L. R., 47 All., 637.

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application for substitution of names was filed, which was ultimately granted by a learned Judge of this Court, and the original appellant's father and mother were brought on the record in her place in the array of the appellants. The learned Judge at the time of passing this order did not, however, decide whether they were not bound by any compromise which had been entered into by their predecessor.

The learned counsel for the respondent has taken a preliminary objection that the present heirs are not entitled to continue this appeal. His first contention is that the application in substance was one for the withdrawal of the appeal and did not amount to an adjustment or a compromise. We cannot accept this contention. The application which was filed in the court of the Subordinate Judge did not purport to be an application to withdraw the appeal. On the other hand, it expressly mentioned that there was a compromise between the parties under which the appeal was to be dismissed and the parties were to bear their own costs. The case therefore undoubtedly falls, not under order XXIII, rule 1, but under rule 3 of that order. Before a decree can be passed in terms of this compromise it is to be proved to the satisfaction of this Court that the appeal has been adjusted wholly or in part by a lawful agreement or compromise between the parties. The learned advocate for the respondent argues that, inasmuch as the compromise signed by the lady is duly verified, it must be assumed that it was a lawful compromise. We are of opinion that the adjustment of the appeal is something distinct and independent from the compromise being a lawful one. The execution of the application for compromise and its due verification before an officer appointed by the court below is a proof that the appeal

had been adjusted wholly by the parties. That, however, does not necessarily show that the adjustment was necessarily lawful.

Order XXIII, rule 3, does not merely say that the agreement or compromise should be binding on the parties. It speaks of its being "lawful". The rule is imperative and it would be the duty of the court to order such agreement or compromise to be recorded unless it finds that the compromise is not lawful.

The affidavit filed on behalf of the appellants suggests that the lady may have been under the undue influence or coercion of the defendant at the time when she entered into the compromise. It is not expressly mentioned that any fraud was committed on her, but the learned vakil for the appellants contends that the application implies that such fraud was committed. Lastly he argues that according to the allegations contained in the affidavit she was suffering from death-illness at the time and the relinquishment of her dower, which would deprive the heirs of their rights, had the effect of defeating the provisions of the Muhammadan law.

In our opinion the word "lawful" in order XXIII, rule 3, does not merely mean binding or enforceable. A contract which is brought about either by undue influence, misrepresentation or fraud is, under sections 19 and 19A of the Indian Contract Act, merely voidable and not absolutely illegal or unlawful. Section 23 of the Act indicates when the consideration or object of an agreement is unlawful. These are cases where it is forbidden by law or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to any person or property, or where the court regards it as immoral or opposed to public policy. We think that the word

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"lawful" in order XXIII, rule 3, refers to agreements which in their very terms or nature are not "unlawful", and may therefore include agreements which are voidable at the option of one of the parties thereto because they have been brought about by undue influence, coercion or fraud. The learned vakil for the appellant has strongly relied upon the case of *Nand Lal* v. *Ram Sarup* (1), where ADDISON and AGHA HAIDER, JJ., held that where the document was obtained by the exercise of undue influence it cannot be said that the suit had been adjusted by a lawful agreement or compromise as required by the provisions of order XXIII, rule 3, of the Code of Civil Procedure. With great respect to the learned Judges we are unable to agree with their interpretation of the word "lawful" in the rule. Their attention was apparently not drawn to two earlier cases of their own Court, where a contrary opinion had been expressed: *Budhu Mal* v. *Rup Kour* (2) and *Ala Bakhsh Khan* v. *Kasim Ali Khan* (3).

It is, however, possible to take the view that, independently of order XXIII, rule 3, the court has inherent jurisdiction under section 151 of the Code to refuse to record a compromise which has been brought about by undue influence: *Sreemati Sabitri Thakurain* v. *Savi* (4). The majority of the Judges in *Gajendra Singh* v. *Durga Kunwar* (5), invoked their inherent jurisdiction for recording a compromise, independently or order XXIII, rule 3. But where the person who is said to have been subjected to undue influence did not repudiate the compromise in her life time and is now dead, and the question of the alleged undue influence will involve an elaborate and lengthy inquiry which cannot be satisfactorily made in a summary proceeding, we are not bound to exercise any extraordinary discretionary

(1) (1927) A. I. R., Lahore, 546. (2) (1890) P. R., No. 81, p. 254.
(3) (1895) P. R., No. 48, p. 203. (4) (1926) I. L. R., 6 Pat., 108 (128).
(5) (1925) I. L. R., 47 All., 637.

powers, assuming that such powers exist. This matter can best be re-agitated in a separate suit.

The learned vakil for the appellants has next contended that under the Muhammadan law a relinquishment of a debt during *marz-ul-maut* so as to deprive the heirs was unlawful, inasmuch as such a bequest would defeat the provisions of the Muhammadan law which makes such bequest invalid unless assented to by the heirs. In our opinion, when the validity of a bequest is contingent upon the consent of the heirs it cannot be said that such a bequest is forbidden by the law, or defeats the provisions of any law, nor can it be said that it is necessarily void *ab initio*. It would, therefore, be very difficult to hold that this bequest was unlawful within the meaning of order XXIII, rule 3. Furthermore, this would necessitate an elaborate inquiry into the question whether the deceased was in fact suffering from *marz-ul-maut* at the time, and whether the property bequeathed by her exceeded a one-third share of her estate, which matters cannot be conveniently inquired into in these summary proceedings.

We are further of opinion that the question of the relinquishment of the dower does not substantially arise in these proceedings. That is contained in a registered compromise alleged to have been executed by her, which is not before us. The application which has been forwarded to this Court by the Subordinate Judge merely contains a prayer that the appeal should be dismissed and that the parties should bear their own costs. We are, therefore, not called upon to consider whether a valid relinquishment of the dower debt had been made by the lady, or whether such relinquishment is binding on her heirs after her death. The application for compromise under which the parties agreed that the appeal should be dismissed and the parties should bear their

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own costs has been duly proved and verified. This shows that this appeal at any rate has been wholly adjusted, and there is nothing to show that in its nature such a compromise was unlawful.

Under these circumstances we are of opinion that we must order that the compromise should be recorded and a decree should be passed to the effect that the appeal has been compromised and is hereby dismissed. The parties will bear their own costs of these proceedings.

Appeal dismissed.

Before Mr. Justice Boys and Mr. Justice Ashworth.

1928 *March*, 2.

BHOGI RAM (PLAINTIFF) *v.* KISHORI LAL (DEFENDANT).*

Act No. XXVI of 1881 (*Negotiable Instruments Act*), *section* 46—*Act No. I of* 1872 (*Indian Evidence Act*), *section* 92, *proviso* (3)—*Promissory note—Suit on note—Defendant entitled to give evidence of collateral agreement delaying payment of note.*

There is nothing in law to debar the maker of a promissory note from pleading as a defence to a suit thereon that as a matter of fact the note was given for a special purpose and was not payable until the happening of a certain specific event which, so far, had not yet happened.

Sheo Prasad, Ram Prasad v. *Gobind Prasad* (1), followed. *Sri Ram* v. *Sobha Ram, Gopal Rai* (2), dissented from.

THE facts of this case are stated at some length in the judgement of BOYS, J.

Sir *Tej Bahadur Sapru*, Babu *Piari Lal Banerji* and Babu *Satish Chandra Das*, for the appellant.

Pandit *Shiam Krishna Dar*, for the respondent.

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* Second Appeal No. 1593 of 1926, from a decree of Shamsul Hasan, Additional Subordinate Judge of Muttra, dated the 4th of September, 1926, reversing a decree of Gopal Chand Sharma, Munsif of Muttra, dated the 21st of December, 1925.

(1) (1927) I. L. R., 49 All., 464. (2) (1922) I. L. R., 44 All., 521.

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BOYS, J.—This appeal arises out of a decree of the lower appellate court, setting aside the decree of the trial court allowing the plaintiff's claim on a promissory note. The suit of the plaintiff was a simple one on a promissory note. The answer of the defendant, however, disclosed other dealings; and it has been found by both courts that the plaintiff's denials of those dealings were false.

The language used throughout, and particularly in the judgement of the lower appellate court, has not been as clear as it might well have been, and a more detailed statement of the pleadings and the findings is necessary than is usually the case in such suits. The defendant pleaded :—

(*a*) (Further plea No. 2) That he, the defendant, used to hand over "gur", sugar and grain to the plaintiff to be sold on account of the defendant.

(*b*) (Further plea No. 2) That pending the sale and recovery of the price of the goods plaintiff used to advance to the defendant sums of money bearing interest,

(*i*) " on the security of the goods "; and

(*ii*) " for the further satisfaction " of the plaintiff defendant used to execute promissory notes for the sums advanced.

(*c*) (Further plea No. 2) That the money received by the plaintiff from the sale of the goods was to be deducted as received from the debt due by the defendant.

So far, I find this pleading of the defendant to be quite simple and straightforward. In the accounting between them the amounts received by the plaintiff on sale of the goods were to be entered on the credit side to

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the defendant, and the amounts advanced to the defendant were to be entered on the debit side against the defendant.

The entry of one such sum on the debit side is illustrated in further pleas Nos. 3 and 4 in the written statement, and is as follows :—

"Rs. 1,001, *Pus Badi* 6, *Sambat* 1979, *ruqqa* one, interest at Re 1 per cent.".

This appears to me to offer no difficulty. It is merely a convenient brief way of entering that on the date in question the defendant received Rs. 1,001, the sum in connection with which he wrote a "*ruqqa*" of that date.

The pleading of the defendant continues (further pleas Nos. 5 and 6) :—

(*d*) That subsequently an account (this is Ex. A) was struck between the parties on *Kuar Badi* 9, Sambat 1980, in which defendant was found to owe on the balance Rs. 963-8.

(*e*) That in arriving at this balance the amount of Rs. 1,525 (which is in dispute in the present suit and which he had received in advance upon the security of the goods and in regard to which he had for the further satisfaction of the plaintiff executed the *ruqqa* in suit) was debited against him.

(*f*) That (further pleas Nos. 7, 8 and 9) subsequent to the settling of the last-mentioned account the plaintiff had carried out further sales for the defendant, but he had not yet furnished any account.

Whether these pleadings of the defendant were established by him was a matter for determination in the suit, but on a careful reading of the whole written statement I find the pleas in their entirety quite straightforward. They amount to : "The promissory notes which

I gave were only for further security, if the security of the goods proved insufficient. In evidence of that I show that the amounts represented by the promissory notes have been debited against me and with a clear reference to the promissory notes in accounts which were declaredly accounts of the *malpeta* (goods in security) transactions " (see the heading to the account set out in further pleas Nos. 3 and 4). I do not think the issues in the trial court were happily framed, but that would not be material at this stage if in truth there has been clear understanding as to what were the points in issue and there has been a finding or findings on those points.

Boys, J.

The trial court believed the whole of the defendant's story as to the " sale of grain " transactions between the parties and the account taken between them and that the plaintiff was concealing his account-books. But the learned Munsif held that the promissory note and the taking of the Rs. 1,525 was an entirely independent transaction. The only reason given by him for so holding is that he thought that the defendant would not be so foolish as to give an additional documentary security where the goods were also security, wholly ignoring that the goods might not be good enough security to make the plaintiff feel at ease in advancing the whole amount, and that it would be the plaintiff who would demand the further security. All he has to say about the plaintiff withholding his account-books is that he is doing so " for reasons best known to himself ".

The lower appellate court, agreeing with the trial court's findings on all the preliminary points and differing from its final finding, held—

(*a*) that the plaintiff's denials of grain transactions were false;

(*b*) that Exhibit A (the account including this matter of Rs. 1,525, to which I have referred)

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" shows that *this transaction* was intended by the parties to be included in the accounts";

(*c*) that the balance due to the plaintiff on the last taking of account was Rs. 963-8;

(*d*) that no final account having been taken, no decree for a balance could be passed;

(*e*) that the suit in its present form is not maintainable.

Here again the conclusions might have been more happily expressed, but I think that the conclusions—

(1) that " this transaction " (which can only mean the giving by the plaintiff of Rs. 1,525 to the defendant) "was intended by the parties to be included in the account" (which can only mean the accounts of the grain transactions, for there is no question of any other accounts);

(2) that the last balance of account taken, alleged by the defendant, was proved;

(3) that no final balance of account had been taken; and

(4) that the present claim was not maintainable,

can only be taken as a finding of all points in the defendant's favour that the giving of Rs. 1,525 was part of the grain transactions and the promissory note was only intended to be a further security, if on taking the accounts of the grain transactions a balance was due against the defendant which he failed to pay.

The only question which remains, but which appears never to have been specifically raised by the plaintiff in the courts below, is whether the defendant could, in view of section 92 of the Evidence Act, be allowed to go outside the promissory note. I think he clearly

could, in view of proviso (3) to that section. The defendant was entitled to prove (and did prove, as I interpret the pleadings and the finding of the lower appellate court) a separate oral agreement that a condition precedent to the attaching of any obligation to the contract evidenced by the promissory note was that there should not be any obligation attaching under it unless there was a final balance of account on the grain transactions against the defendant which he failed to pay.

I have no hesitation in accepting the decision in *Sheo Prasad, Ram Prasad* v. *Gobind Prasad* (1), in preference to the decision in *Sri Ram* v. *Sobha Ram, Gopal Rai* (2), which latter, to me unaccountably, failed to consider the third proviso to section 92 of the Evidence Act.

I would dismiss the appeal with costs.

ASHWORTH, J.—I concur. In this case the plaintiff Bhogi Ram, who is appellant in this Court, sued the defendant respondent Kishori Lal for recovery of Rs. 2,000 on the basis of a pro-note, dated the 12th of January, 1923, executed by the defendant in favour of the plaintiff. The defence was in effect that the promissory note had been delivered for a special purpose only, namely, as "a continuing security to meet the running balance from time to time that might be due on an account between the parties as merchant (i.e., the defendant) and as commission agent (the plaintiff), which running account included advances on the goods before realization of the price." In other words, whereas the plaintiff maintained that the note was delivered as security for a particular advance, the defendant maintained that it was delivered as security for the balance of the running account which might be found due when the accounting between the parties came to an end either

(1) (1927) I. L. R., 49 All., 464. (2) (1922) I. L. R., 44 All., 521

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by discontinuance of mutual business or by either party desiring the account to be settled up.

The trial court found against the defendant on the ground that delivery was absolute for the purpose of securing the particular amount mentioned in the promissory note and advanced that very day and was not a delivery merely for the purpose of securing any balance that might be found on the running account. In appeal the Subordinate Judge held otherwise. He believed the oral evidence of the defendant in preference to that of the plaintiff because the former evidence was supported by the fact that the plaintiff's son had been a party to the entry of this sum in a statement of the running account and also because the plaintiff and his son had in his opinion made some untrue statements which detracted from their credibility generally. Now in this second appeal it is not open to us to go behind a finding of fact in support of which there was some evidence on which a court could reasonably act in coming to a decision. I hold that the evidence mentioned was such evidence. It is, therefore, not open to this Court to consider whether it would have come to the same decision on the evidence. For instance, if it had been open to me to come to a decision on the evidence I should have been struck by the fact that this note was drawn up for the precise amount lent on the particular date and not for a round figure. There could be no probability of a balance of account coming to this particular sum and so the fact that the sum entered in the note was exactly the same as the advance would be an argument in favour of the plaintiff. On the other hand, it appears that the plaintiff's son might reasonably be regarded as the plaintiff's agent acting under the plaintiff's express or general instructions. The incorporation, therefore, by the plaintiff's son of the sum entered in the note in the running account (although it may have

amounted only to an offer to receive payment by incorporation) was a fact that might be invoked in favour of the defendant as supporting his plea. The case is extremely similar to the case, *In re Boys* (1), which case indeed was the basis of the illustration 8 appended to section 21 of the English Bills of Exchange Act, VIII of 1882, a section equivalent to section 46 of the Indian Negotiable Instruments Act. In that case Lord ROMILLY decided against the contention that the promissory note was given to secure the payment of the balance and not to secure the payment of the advance, and made great point of the fact that the amount in the promissory note was the same as the joint amount of two advances made just before the execution of the note. On the other hand, in that case there does not appear to have been any evidence that the amount was ever incorporated in the running account at a subsequent date. Although, therefore, if I had been deciding the case myself, I might have been disposed to decide it on the evidence in the opposite way, yet I am unable to say that, there being a finding of fact of the lower appellate court the other way, there is sufficient reason for interfering with that finding.



The question whether delivery of a promissory note as between the person making that note and the payee can be regarded as conditional or for a special purpose only, within the language of section 46, paragraph 3, of the Negotiable Instruments Act of 1881, depneds upon the construction we place upon the words " as between such parties and any holder of the instrument other than a holder in due course." These words are capable of two constructions. One construction would involve paraphrasing these words as follows :—

" As between either the maker of the note *or* the payee of the note *or* the endorser of the note *or* the endorsee of the

(1) (1870) L. R., 10 Eq., 467.

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note *and* any holder of the instrument other than a holder in due course."

The other construction would involve paraphrasing them thus :—

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"As between the maker and the payee or the endorser and the endorsee or the endorsee and any holder other than a holder in due course or as between any one of such parties and any other."

The ambiguity of the language of section 46 of the Negotiable Instruments Act was noticed when the English Bills of Exchange Act was drafted a year later and was avoided by substituting for the language of section 46 the following :—

"As between immediate parties and as regards a remote party."

It is improbable, especially having regard to the fact that there was one draftsman both of the English and the Indian Acts (namely M. D. Chalmers), that any difference in law was intended. So I would select the second meaning. In favour of selecting the alternative meaning there is only the fact that the American writer, John W. Daniel, in his treatise on the law of Negotiable Instruments published in 1876, has expressed the opinion that "a bill or note cannot be shown to have been delivered to the promisee as an escrow, for the evidence would be repugnant to the Act"; see volume I, page 54. But this view of the matter does not appear to have been adopted in any English decisions. On the contrary, the decisions in England clearly show that, although a promise to pay may be stated in the note to be unconditional and upon demand, the maker of the note may prove that he only delivered it upon terms inconsistent with payment being unconditional and upon demand. This is actually no exception to section 92 of the Evidence Act. That section refers

to documents which operate by reason merely of signature. See section 2 (12) of the Indian Stamp Act II of 1889. A promissory note, because it is a negotiable instrument and thus partakes of the nature of currency, before it can operate must not only be signed but also delivered (see section 46 of the Negotiable Instruments Act). A man may say:—"The promissory note that I signed I do not choose to deliver, but I will deliver it on the condition that the note is only used upon the fulfilment of a certain condition (i.e., something which may or may not occur but not which must occur) or for special purpose (which purpose may, however, involve postponement of its operation)". There is thus a distinction between a note of which delivery is conditional and a note of which delivery is for a special purpose. Mere postponement of operation will not operate as a condition, but it may operate because the special purpose involves postponement. Thus we have a case where delivery was on the condition that the note was not to operate until a man's death, see *Woodbridge* v. *Spooner* (1). This condition was held not to be enforceable as it was mere postponement.

Ashworth, J.

The decision in *Sheo Prasad, Ram Prasad* v. *Gobind Prasad* (2) to the effect that evidence is admissible to prove that delivery of a note is conditional on the note only being used as collateral security for a balance on a running account appears to me correct and the decision in *Sri Ram* v. *Sobha Ram, Gopal Rai* (3), wrong. Section 46 of the Negotiable Instruments Act, being a special provision applicable to negotiable instruments (which require delivery), governs the matter and not section 92, proviso (3), which is a general section applicable to deeds completed by signature. The latter ruling was wrong, I hold, because it failed to invoke section 46 of the Nego-

(1) (1819) 3 B. & Ald., 233. (2) (1927) I. L. R., 49 All., 464.
(3) (1922) I. L. R., 44 All., 521.

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tiable Instruments Act and not because it failed to invoke section, 92, proviso (3), of the Evidence Act.

There is no question in this case of the money due under the promissory note having been discharged; for there was no evidence that a balance of the account incorporating this liability was ever struck. The only evidence was that the amount was entered in an account from which a balance might at a future date be struck.

BY THE COURT.—The appeal is dismissed with costs.

Appeal dismissed.

REVISIONAL CIVIL.

Before Mr. Justice Dalal.

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March, 8.

AJUDHIA PRASAD (PLAINTIFF) *v.* RIKHNATH (DEFENDANT).*

Act No. X of 1923 (*Indian Paper Currency Act*), *section* 25—*Promissory note—Note framed as payable to lender or order not within the prohibition of the Act.*

Held, that a document which consisted of a promissory note and a receipt, and in the latter the promissory note was described as "*indultalab*" meaning "on demand", and in the note the words were that the money would be paid " on demand to him, that is, to the lender, or to whomever he orders it to be paid", was not obnoxious to the provisions of section 25 of the Indian Paper Currency Act, 1923. *Chidambaram Chettiar* v. *Ayyasawmi Thevan* (1) and *Jetha Parkha* v. *Ramchandra Vithoba* (2), referred to.

THE facts of this case sufficiently appear from the judgement of the Court.

Munshi *Bhagwati Shankar*, for the applicant.

The opposite party was not represented.

*Civil Revision No. 12 of 1928.

(1) (1916) I. L. R., 40 Mad., 585. (2) (1892) I. L. R., 16 Bom., 689.

DALAL, J.—It is unfortunate that the opposite party was not represented, but the Court had the advantage of very valuable argument addressed to it by Mr. *Bhagwati Shankar*. He has placed a printed note before the Court and carefully explained how the words therein cannot be said to offend against the provisions of section 25 of the Indian Paper Currency Act (X of 1923), which replaced previous similar Acts which dated back from 1871 down. What section 25 of the Indian Paper Currency Act prohibits is this—

"No person in British India shall draw, accept, make or issue any bill of exchange, *hundi*, promissory note or engagement for the payment of money payable to bearer on demand . . . . of any such person."

The document in suit consists of a promissory note and a receipt. In the receipt the promissory note is described as "*indultalab*", meaning "on demand". In the note itself the words are that the money would be paid "*mangne par unko ya jisko woh dilwaen unke hukam par*" (on demand to him, that is, to the lender, or to whomever he orders it to be paid). There are no words here to imply that the money was payable to bearer on demand. In the ruling quoted by the lower court, *Chidambaram Chettiar* v. *Ayyasawmi Thevan* (1), the point of offence is detailed by KRISHNAN, J., at page 588. In the note which was before their Lordships there was an additional word that the note was payable to bearer. The argument there was that the note was payable to a person or to his order as well. And on this argument the learned Judge observed as follows :—

"It was further argued that the note in suit did not fall within section 26 of Act No. II of 1910" (corresponding section 25 of the present Act of 1923) "as it was a note payable, not only to bearer, but to a person or his order also. This addition can make no difference, as the note is still a note payable to bearer on demand."

(1) (1926) I. L. R., 40 Mad., 585.

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It is clear that in the Judge's opinion if the words "payable to bearer" had not existed, a note payable to a person or his order would not have offended against the provisions of the Indian Paper Currency Act. The judgement of FARRAN, J., in *Jetha Parkha* v. *Ramchandra Vithoba* (1) is a valuable contribution to the law on the subject. Here the note was payable to owner on demand. The learned Judge pointed out that the provisions in the Indian Paper Currency Act follow the wording of the English Bank Charter Act, which was subsequently explained by Stat. 17 and 18 Vict., c. 83, section II. The explanation was that promissory notes which shall entitle, or be intended to entitle, the bearer or holder thereof without endorsement to the payment of any sum of money on demand . . . . . shall be deemed to be notes within the meaning of the English Bank Charter Act. The Indian Paper Currency Act has not been so explained, but the same interpretation should be given to its words. The real test, therefore, is whether the promissory note in suit is payable to any person who may be in possession thereof. Will the bearer of this note without any endorsement have a right to be paid the money due on the note? According to the wording of the note he certainly would not. The demand has to be made by the lender himself, or someone to whom he may order payment. Without endorsement to a particular person the note will not be payable to the bearer thereof. I am therefore of opinion that the lower court was wrong in holding the note to be illegal and void.

I set aside the decree of the trial court and remand the suit to it for a trial on the merits. Costs here and heretofore shall abide the result.

Application allowed.

(1) (1892) I. L. R., 16 Bom., 689.

APPELLATE CIVIL.

Before Mr. Justice Mukerji and Mr. Justice Sen.

SOHAN BIBI (JUDGEMENT-DEBTOR) *v.* BAIJNATH DAS AND OTHERS (DECREE-HOLDERS).* 1928 *March*, 9.

Civil Procedure Code, section 144, *order XLV, rule* 15—*Application for restitution as a necessary consequence of an order of His Majesty in Council—Limitation—Act No. IX of* 1908 (*Indian Limitation Act*), *schedule I, article* 183—*Accidental misdescription of court to which order transmitted for execution—Jurisdiction.*

Where an application is made to obtain restitution as the necessary result of an order of His Majesty in Council, that application must be taken as one to "enforce" an order in Council and will be governed by article 183, and not by the general article 181 of the Indian Limitation Act, 1908.

Baijnath Das v. *Balmakund* (1), *and Brij Lal* v. *Damodar Das* (2), referred to.

In the case of an application under order XLV, rule 15, of the Code of Civil Procedure made within 12 years from the date of the order of the Privy Council, the fact that by inadvertence the papers were directed to be sent to a wrong court would not amount to an illegality such as would either vitiate the proceedings or deprive the court, to which the papers were intended to be sent down, of its jurisdiction to proceed with the execution of the decree of the Privy Council.

THE facts of this case were as follows :—

The appellant Sohan Bibi instituted a suit in the court of the Judge of Small Causes at Benares, exercising the powers of a Subordinate Judge, against several persons, to obtain a declaration that a certain compromise entered into in a certain case, the decree that followed the compromise and the transfer of property that was to take place in pursuance of the compromise, were not binding on her. The suit was transferred to the court of

*First Appeal No. 87 of 1927, from a decree of Hanuman Prasad Verma, Subordinate Judge of Benares, dated the 19th of January 1927.

(1) (1924) I. L. R., 47 All., 98. (2) (1922) I. L. R., 44 All., 555.

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the District Judge of Benares and was decided by him. The District Judge dismissed the suit. The plaintiff appealed and the decree of the court below was set aside and the suit was remanded for trial on the merits. The District Judge again dismissed the suit and, on appeal, this Court set aside the decree of the learned Judge and decreed the suit in part. There was an appeal to the Privy Council by the defendants and it was successful. The Privy Council decree was passed on the 14th of May, 1914. In the meanwhile, Musammat Sohan Bibi, as the successful litigant in India, had executed her decree and had realized all the costs that had been decreed to her.

On the 9th of May, 1917, the defendants made an application to this Court, purporting to be one under order XLV, rule 15, of the Code of Civil Procedure, asking this Court to transmit a copy of the order of His Majesty in Council to the court of first instance for execution. In that application they also prayed that a sum of Rs. 735-6, being costs incurred in India, on account of the Privy Council appeal, should also be allowed to be recovered by them. On the 10th of January, 1918, two learned Judges of this Court passed the following order :—

"Let the order of His Majesty in Council be sent down to the Small Causes Court Judge at Benares with powers of a Subordinate Judge, for execution according to law and let the amount taxed by this Court be certified to the court below."

Long after this order had been made, on the 22nd of February, 1926, the respondents made the application out of which this appeal has arisen for execution of the Privy Council decree and for recovery of such moneys as the appellant had realized under the decree that stood in her favour, to the District Judge of Benares. The District Judge ordered, on the 5th of May, 1926, that the execution case be transferred to the Subordinate Judge

(Judge, Small Causes Court, exercising powers of Subordinate Judge) for execution. Exception was taken to the execution, but the Subordinate Judge rejected the objections of the appellant and ordered the execution to proceed. The judgement-debtor appealed to the High Court.

Dr. *Kailas Nath Katju*, Babu *Piari Lal Banerji* and Munshi *Harnandan Prasad*, for the appellant.

Munshi *Kamla Kant Varma* and Pandit *Brajmohan Lal Dave*, for the respondents.

The judgement of MUKERJI, J., after setting out the facts as above, thus continued :—

In this Court two points have been taken. The first point is that so far as the application was for restitution of costs recovered by Sohan Bibi, the application was covered by article 181 of the Limitation Act and the application before the District Judge, having been made more than three years after the order of His Majesty in Council, was barred by limitation. The second point is that the court which had jurisdiction to execute the order in Council of His Majesty was the court of the District Judge of Benares, and that court, not having been authorized by this Court, in its order, dated the 10th of January, 1918, could not entertain the application and could not transfer it to the Subordinate Judge.

In my opinion, none of these pleas ought to prevail. So far as the application for restitution goes, the application, in my opinion, is one "to enforce an order of His Majesty in Council" within the meaning of article 183 of the first schedule to the Limitation Act, and 12 years' rule would apply. It has been much debated whether an application for restitution, within the meaning of section 144 of the Code of Civil Procedure is an application for execution of the decree or not. In my opinion the same answer cannot be given to this

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question under all circumstances. For example, for purposes of court fee in an appeal, an application for restitution may not be treated as one for execution—Vide *Baijnath Das* v. *Balmakund* (1). I do not express any opinion whatsoever as to the correctness or otherwise of this case. All that I want to point out is this. The same answer may not be given when the question has to be looked at from different points of view. In this case, the question is whether article 183 should apply or article 181 of the Indian Limitation Act, 1908. Article 181 applies when there is no other article which may be applied. Article 182 applies to the "execution" of a decree. Article 183 applies where the applicant wants "to enforce" an order of His Majesty in Council. It appears to me that the legislature did not mean to express the same idea by the use of different words. (See Craies on Statute Law, third edition, 1923, pp. 87 and 88.) The word "enforce" ought to have a much larger meaning than the word "execution." It is not necessary to inquire why, for the execution of a Privy Council judgement, the period of 12 years has been allowed, whereas for the execution of a judgment passed in this country the much smaller period of three years has been allowed. But, whatever may be the reason, the reason which induced the legislature to give a longer period in the case of execution of Privy Council judgements is likely to have induced them to give the same long period in the case of restitution. Section 144 of the Code of Civil Procedure is not a rule of substantive law. The right to refund, or restitution, would exist in spite of the said section. It lays down merely the procedure. I need not therefore decide whether, generally, an application for restitution is an application for execution of the decree passed by the

(1) (1924) I. L. R., 47 All., 98.

court of appeal. It is enough for my purposes to hold and I do hold that, where an application is made to obtain restitution as the necessary result of the order of His Majesty in Council, that application is to be taken as one to "enforce" an order in Council and must be governed by article 183 and not by the general and omnibus article 181. The same view was taken in the case of *Brij Lal* v. *Damodar Das* (1) by RYVES, J.

Coming to the second point, the matter stands thus. The respondents in their application said that their application with a copy of the order of His Majesty in Council should be transmitted to "the court of first instance." This Court said that the papers should be transmitted for execution "in accordance with law." It was not necessary for this Court to indicate by name the court to which the papers were to be sent. The words "Judge of Small Cause Court exercising the powers of a Subordinate Judge" were entirely unnecessary and were used merely because of the misapprehension that the court which decided the case originally was that court. I have already stated that the suit was actually instituted in the court of the officer aforesaid. The mistake in the judgement of this Court was therefore in the nature of a mere slip. It is a fact that in spite of all search made, no trace of the papers which were ordered to be sent down by this Court was found in the court of the learned Subordinate Judge. We must take it that the papers were in order and were sent down. As they were not found in the court of the Subordinate Judge, they were probably sent to the District Judge. Owing to the lapse of time, the papers may have been weeded out. In any case, we find that the application to this Court was in order. The application to the court of the District Judge was to the right court.

(1) (1922) I. L. R., 44 All., 555.

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Then we find that this Court did make an order transmitting the order of His Majesty in Council to be executed "in accordance with law." There is nothing to indicate that this Court had any particular object in view in sending the case to a court different from the trial court. In the circumstances, the misdescription of the court which was to execute the decree was merely in the nature of a slip and did not, in my opinion, affect the jurisdiction of the District Judge to execute the decree.

A third point was taken that the respondents were not entitled to any interest; but they are not claiming any interest in pursuance of any order of His Majesty in Council. They are claiming interest on the money which was realized from them, by the unsuccessful appellant, while the decree stood in her favour. To this interest they are clearly entitled under section 144 of the Code of Civil Procedure.

In the result, I would dismiss the appeal with costs.

SEN, J., [after re-stating the facts in full] :—

I am in entire agreement with my learned brother that this Court intended to transmit the papers to the original court, viz., the court of the District Judge of Benares, along with the certified copy of the decree which accompanied the application dated the 9th of May, 1917, and it was a mere slip that the "Small Causes Court of Benares" was mentioned in the said order, whereas the Court indubitably intended to mean "the court of the learned District Judge of Benares." Where a misdescription of this character has by a mere slip or accidental error crept its way into the order of the Court, this does not amount to an illegality calculated either to vitiate the proceedings or to deprive the court to which the papers were intended to be sent down, of the jurisdiction to proceed with the execution of the decree of the Privy Council. I hold, therefore, that the application

dated the 22nd of February, 1926, made to the learned District Judge of Benares was an application in accordance with the provisions of order XLV, rule 15, of the Code and the said application having been made within 12 years from the date of the order of His Majesty in Council, dated the 14th of May, 1914, is an application within time and that article 183 of the Limitation Act governs the application for the execution of the decree for costs passed by His Magesty in Council.

It appears that on the 2nd of February, 1912, the appellants realized from the respondents the sum of Rs. 2,710-11-4 in execution of the decree which then subsisted in their favour. In the present application they claim the recovery of that amount together with interest at 6 per cent. from the 2nd of February, 1912. The court below has allowed the decree to be executed as regards these two sums. It is contended before me that the application for restitution is a substantive application under section 144 of the Code of Civil Procedure. That section provides :—

"Where and in so far as a decree is varied or reversed, the court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed; and, for this purpose, the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal."

The order of the Privy Council did not contain any directions for the restitution of the sums of money recovered by the judgement-debtors appellants in the previous execution proceedings or for the payment of the said sum with interest at certain rate. It is not controverted,

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and indeed it cannot be disputed, that the right of restitution is a right which logically follows from the right accruing to a party in whose favour a decree has been passed by the Privy Council reversing the decree of the High Court, and the said right is one which is consequential upon the reversal of the decree of the High Court. The question which arises in the case is, which is the article of the Limitation Act which should be applicable to an application for restitution under section 144 of the Code of Civil Procedure? Is it article 181 or article 183? Article 183 of the Limitation Act provides that the period of limitation is 12 years to enforce an order of His Majesty in Council, from the date when the right to enforce the order accrues to some person capable of realizing the right, whereas the right to restitution springs from and is the logical consequence of the order of the Privy Council reversing the decree of the High Court. The application for restitution cannot be treated as an application to enforce the order of the Privy Council. The word "enforce" does not mean any thing more or any thing less than the right to compel the observance of a certain order. Even assuming that the word "enforce" is more comprehensive than the word "execute", what is sought to be enforced is the order and we have got to look to the order to see as to whether that order itself is comprehensive enough to include restitution. I consider that article 183 of the Limitation Act is not applicable to an application for restitution under section 144, and if article 183 does not govern the application, article 181 being the omnibus or the residuary article is applicable to the case, and if article 181 applies, the claim for the restitution of Rs. 2,710-11-4 together with interest is barred by time. Whatever my individual views on the point may be, I am bound by the ruling of this Court reported in *Brij Lal* v. *Damodar Das* (1), decided by

(1) (1922) I. L. R., 44 All., 555.

Mr. Justice WALSH and Mr. Justice RYVES, who, dealing with this question, observed as follows :—

"Mr. Justice STUART, in a previous matter which came before him by way of first appeal in May of last year (the case in *Madhusudan Das* v. *Brij Lal*, 61 I. C., 806), held that the application was one justified by the provisions of section 144, and, inasmuch as its only authority was derived from the final decree of the Privy Council, it came within the expression used in article 183 of the Limitation Act, as being an application to enforce an order of His Majesty in Council. The words which we have just quoted are clearly capable of being read so as to cover an application of this kind, which is in substance one to enforce a decree of the Privy Council which restored the parties to the position they were in before the High Court interfered. We think the only logical course to take, whatever academic view one might take as a matter of construction in the interpretation of these somewhat difficult provisions, is to follow the view taken by Mr. Justice STUART in the case of *Madhusudan Das* v. *Brij Lal*."

As I have said above, it may be questionable as to whether the canons of logic could always be safely imported in construing the plain language of any rule or section of a statute. In its plain reading, the article 183 or order XLV, rule 15, does not seem to present any difficulties. A substantive right is capable of being enforced in a particular way. Section 144 of the Code of Civil Procedure points out the forum in which the right has got to be enforced and it prescribes a particular line of procedure. That section appears to be independent of the provisions of order XLV, rule 15, and cannot be said to be a resultant of section 144 of the Code, but, as I have indicated above, I am bound by the ruling of a Divisional Bench of this Court in *Brij Lal* v. *Damodar* Das (1), and from that standpoint it must be held that article 183 is the article applicable to the present case and consequently the claim as to the restitution of the deposited sum of money is not time-barred.

(1) (1922) I. L. R., 44 All., 555.

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Although the decree of the Privy Council does not allow any interest at the rate of 6 per cent. on the amount of costs allowed, there can be no doubt that the defendants appellants had the use of the money which legitimately belongs to the respondents, for a long series of years. The respondents, therefore, were entitled to claim interest by way of damages and the appellants therefore are in equity bound to pay the same. A case of this description has been actually provided for in section 144, which clearly prescribes that in an application under the said section, damages consequential on the reversal of a decree or order may well be granted to the successful party. The result of it is that the respondents succeeded all along the line and I would dismiss this appeal with costs.

BY THE COURT.—The appeal is dismissed with costs.

Appeal dismissed.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Mukerji.

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INSPECTOR SINGH AND ANOTHER (PLAINTIFFS) *v.* KHARAK SINGH AND OTHERS (DEFENDANTS).*

Hindu law—Mitakshara—*Joint family including minors*—Karta—*New business started by borrowing money on the security of family property*—"*Benefit to the estate*"—*Admitting minor to benefit of partnership*—*Act No. IX of* 1872 (*Indian Contract Act*), *section* 247.

It is not competent to the manager of a joint Hindu family comprising minor members to raise money on the security of the family property in order to start a new business, even if such business may reasonably be supposed likely to be a profitable one. The "benefit to the estate" contemplated by their Lordships of the Privy Council in *Hunoo-*

*First Appeal No. 553 of 1924, from a decree of Govind Sarup Mathur, First Subordinate Judge of Saharanpur, dated the 17th of November, 1924.

man Persaud Panday v. *Babooee Munraj Koonwaree* (1) must be a benefit of a "defensive nature", calculated to protect the estate from possible danger or destruction.

Sanyasi Charan Mandal v. *Krishna Dhan Banerji* (2), *Palaniappa Chetty* v. *Sreemath Devasikamony Pandara Sannadhi* (3), *Shankar Sahai* v. *Bechu Ram* (4), *Mahabir Prasad Misr* v. *Amla Prasad Rai* (5), *Jagmohan Agrahri* v. *Prag Ahir* (6), *Jado Singh* v. *Nathu Singh* (7), and *Tadibulli Tammireddi* v. *Tadibulli Gangireddi* (8), referred to. *McLaren Morrison* v. *Verschoyle* (9), distinguished.

THE facts of this case were as follows :—

The plaintiffs were two in number and were the sons of the defendant No. 1, Kharak Singh. The defendant No. 1 made a simple mortgage of a portion of the ancestral joint family property in favour of the remaining defendants by a document dated the 19th of September, 1921, for the sum of Rs. 7,000. The plaintiffs' case was that their father was immoral and, within three years of the death of their grandfather, had squandered away a sum of Rs. 20,000 left in cash by the grandfather and had created charges to the amount of Rs. 20,000 on the family property. The plaintiffs sought a declaration that the mortgage of the 19th of September, 1921, was executed for a purpose which was immoral and which did not benefit the family and that therefore, the family property was not liable under the mortgage.

The defendant No. 1 did not enter an appearance. The other defendants, who were father and sons, contended that the mortgage was executed in order to raise money to purchase a motor lorry, that the motor lorry was meant to be plied on hire between two stations in

(1) (1856) 6 Moo. I. A., 393. (2) (1922) I. L. R., 49 Calc., 560.
(3) (1917) I. L. R., 40 Mad., 709. (4) (1925) I. L. R., 47 All., 381.
(5) (1924) I. L. R., 46 All., 364. (6) (1925) I. L. R., 47 All., 452.
(7) (1926) I. L. R., 48 All., 592. (8) (1921) I. L. R., 45 Mad., 281.
(9) (1901) 6 C. W. N., 429.

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the district and that the transaction was meant "for the improvement of the business and benefit of the family" and that, therefore, the transaction was binding on the plaintiffs. The Subordinate Judge arrived at the following findings. He held that, although it was true that the father Kharak Singh was given to drinking and was also in the habit of visiting prostitutes, the transaction could not be impeached upon the ground of immorality, and that his intention was to supplement the income of the family property, which amounted to about Rs. 1,600 a year; that in making such an attempt by running a motor lorry he was followed the example of some others in the neighbourhood, that a part of the income from the hire earned by the lorry was spent for the maintenance of the family, and that, for all those reasons given, the mortgage was binding on the plaintiffs. The suit was, therefore, dismissed.

The plaintiffs appealed.

Dr. *Surendra Nath Sen*, (for whom Mr. *R. C. Ghatak*), for the appellants.

Dr. *Kailas Nath Katju*, for the respondents.

[The judgement of the Court (MEARS, C. J., and MUKERJI, J.,), after setting out the facts as above, thus continued] :—

It has been contended on behalf of the appellants that the learned Judge has taken an entirely erroneous view of the position of a Hindu father. It was said that a Hindu father's rights to interfere with the family property and to raise loans on the same were strictly limited and that, in any case, he could not hypothecate the family property in order to start a new venture, such as the plying of a motor lorry for hire. On behalf of the respondents, the creditors, it has been contended that the family property did not yield the sum of Rs. 1,600 a year

as found by the learned Judge, that the income from the property was hardly sufficient for the maintenance and support of the family, that the father was acting within his rights and authority if he sought to supplement the family income by the new venture and that the court below was right in upholding the mortgage. It being the fact that the learned counsel for the respondents is prepared to challenge the finding of the learned Subordinate Judge as to the income from the landed property, it is necessary to arrive at a finding of fact on this point. [After referring to certain evidence the judgement continued]. We can very fairly estimate the net profit from the property at the figure of Rs. 600 a year.

The family of Kharak Singh consisted of himself, his mother, his wife and the two minor children, the plaintiffs. The first question that arises in the circumstances is whether the income from the property was such as would suffice for the maintenance of the family without it being necessary to raise money for the support of it. It is clear that although Kharak Singh had given up the cultivation of *sir* which in itself yielded a fair return, an income of Rs. 600 a year would, ordinarily, be sufficient for a family of the status and position of Kharak Singh. The family lived in a village and were by caste Rajputs. We find it impossible to hold that the mortgage is supported by "legal necessity," as that term is usually understood.

The contention, however, of the learned counsel for the respondents was that although the income from the family estate may have been just sufficient for the support of the family, the father was not bound to remain contented with the income of the estate and he was in every way entitled to augment the income of the family by engaging in a reasonable trade and to give the family the full benefit of the augmented income.

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There can be no doubt that, generally speaking, every man, especially one who has a family to support, is entitled to embark upon any recognized trade and to make every effort to augment his income for the benefit of himself and his family. But the question that we have to answer is whether, under the Hindu law, a father may be permitted to utilize not only his share, but also the shares of his minor sons, for the above-mentioned object. We cannot decide the case on our abstract notions of the right of a man to improve his position in life. The property involved is the property of three persons. If ordinary rules applied, the owner of a third share has no right to utilize the shares of the owners of the remaining two-thirds, even if it be with the laudable object of doing benefit to the owners of the two-thirds share. It appears to us to be, therefore, clear that the right (if any) of a *Mitakshara* father to jeopardize the family property, consisting not only of his own share but also the shares of his minor sons, must be sought for within the four corners of the texts of the Hindu law. On general principles, the mere fact that Kharak Singh is the father of his sons will not authorize him to hazard property in which his sons have rights.

The text on which the father's right to use the whole of the family property is based is the text of Brihaspati quoted by the author of *Mitakshara*. It will be found translated by Colebrooke in his translation as chapter I, section I, placitum 28. The author of the *Mitakshara* having laid down that the property in the ancestral estate arose by birth and having further laid down the equality of title in the sons with the father, he quotes a text of Brihaspati as an exception to the general rule. Colebrooke's translation runs as follows :—

"An exception to it is as follows : Even a single individual may conclude a donation, mortgage or sale of immov-

able property during a season of distress, for the sake of the family and especially for pious purposes."

It is clear that the case before us is neither a case of distress nor a case of pious purposes. The only question is then whether the transaction was entered into "for the sake of the family", within the meaning of the text quoted. The original expression in Sanskrit is "*kutumbarthe*," which would perhaps be better translated as "for purposes of the members of the family." Vijnaneswara, in the few sentences following the text of the sage, Brihaspati, explains what it means (see placitum No. 29, Colebrooke's book). He says distinctly that the transfer would be justified "if a calamity affecting the whole family require it, or the support of the family render it necessary, or indispensable duties, such as the obsequies of the father or the like, make it unavoidable." The question then is whether this authority of a single individual to conclude a mortgage of immovable property for purposes of the family will include a transaction of raising money at the expense of the family property to engage in a new undertaking. The texts, we find, do not help the respondents.

The powers of the head of a joint Hindu family and the powers of the manager of an estate belonging to an infant have been laid down in a number of cases by their Lordships of the Privy Council. The most famous of the dicta of their Lordships, a dictum which is often quoted, is to be found in the case of *Hunooman Persaud Panday* v. *Babooee Munraj Koonwaree* (1), and runs as follows :—

"The power of the manager of an infant heir to charge an estate not his own is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in case of need or for the benefit of the estate."

(1) (1856) 6 Moo. I. A., 393.

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The words "for the benefit of the estate" are evidently meant to be a substitute for the words "for the purposes of the members of the family" to be found in this text of Brihaspati, quoted by the author of *Mitakshara*. It has been necessary to define what amounts to a "benefit of the estate." The question has arisen whether a benefit to the estate would include using the estate in a more or less speculative manner in the hope that the income of the property would increase and possibly the estate itself would be enlarged. It has, however, been held that the benefit to the estate contemplated by their Lordships of the Privy Council and by the text of Brihaspati must be a benefit "of a defensive nature," calculated to protect the estate from possible danger or destruction. In the case of *Palaniappa Chetty* v. *Sreemath Devasikamony Pandara Sannadhi* (1), the head of a *math* raised money by granting leases and employed the money raised in banking. The question arose, how far the action was justifiable. The principle to be applied in this case was the same as has to be applied in the case of the powers of a head of a joint family in which there are minor members. Their Lordships said at page 718, speaking of "benefit to the estate" :—

> "It is impossible, their Lordships think, to give a precise definition of it applicable to all cases, and they do not attempt to do so. The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation, these and such like things would obviously be benefits. The difficulty is to draw the line as to what are in this connection to be taken as benefits and what not."

Although their Lordships found it impracticable to give a precise definition of the expression "benefit to the estate," they said enough to indicate that the benefit to the estate was to be of a protective character. Their

(1) (1917) I. L. R., 40 Mad., 709.

Lordships quoted three cases in which it was held that it was not open to a *shebait* to lease out in perpetuity a portion of the endowed property at a fixed rent, however adequate such rent might be at the time of the granting of the lease. The reason given was that, by that means, the estate was deprived of the chance it would have, if the rent were variable, of deriving benefit from the enhancement in value in future. In the result, their Lordships held that it was not open to a *shebait* to raise money by obtaining premium by leasing out lands for purposes of starting a banking business with the proceeds. Similarly, in this Court there is a long string of cases in which it was held that it is not open to a father governed by the *Mitakshara* law to encumber joint ancestral property to acquire necessary funds to pre-empt other properties. This was held in one of the latest cases on the point, *Shankar Sahai* v. *Bechu Ram* (1), to which one of us was a party. It is true that a Bench of this Court in another case upheld a transfer of family property by a father to raise money to pre-empt another property, but that case was sought to be brought within the four corners of the principle on which, in order to avoid a danger, the manager is permitted to alienate family property. The case we are referring to is that of *Chotkanu Lal* v. *Ganga Singh* (2). That judgement recognizes the fact that the powers which are given to a manager of a joint Hindu family are strictly limited and are to be exercised within definite rules.

No authority has been cited on behalf of the respondents which goes to the extent of establishing that the manager of a Hindu family can start a new business, and in doing so charge the shares of the minor members, should necessity arise to finance that business. The case where an ancestral family business exists and has been

(1) (1925) I. L. R., 47 All., 381. (2) (1927) A. I. R., All., 219.

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inherited by the minors with other properties must be distinguished from the case where a head of a family with minor members wants to start a business for himself and the members of the family. In the former case, the business is there as a part of the family assets, and it may be carried on in the customary and usual manner in which businesses are conducted. The manager must have all such powers as will enable him to conduct the business. It has accordingly been held in many cases that a manager has power to raise money on the security of the family estate for the maintenance and improvement of an ancestral business, and in doing this the manager is not, in our opinion, acting beyond the rules laid down in the text of Brihaspati or by their Lordships of the Privy Council in the well-known case of *Hunooman Persaud Panday* (1). When the manager of a trading family raises money for the purposes of carrying on the business, he is really acting "for purposes of the family" even if there be no question of "danger." In the case of *Sanyasi Charan Mandal* v. *Krishna Dhan Banerji* (2), the audit managers of a joint Hindu family which possessed, among other property, two separate businesses, started a third one. The business, which flourished for some time, ended in a loss and the question was whether the fifth share of the minor brother could be realized by the creditors for payment to themselves. Their Lordships of the Privy Council held that the minor's share could not be proceeded against. The reason given by their Lordships applies to all cases, irrespective of whether the family is governed by the *Dayabhaga* or the *Mitakshara* law. Their Lordships approved of the remarks of the learned Judges of the Calcutta High Court made in the case as to the risk involved in a manager starting a new venture. In the

(1) (1856) 6 Moo. I. A., 393. (2) (1922) I. L. R., 49 Calc., 560.

High Court judgement in *Krishna Dhan Banerji* v. *Sanyasi Charan Mandal* (1), after quoting the remarks of Lord ATKINSON in the case of the transfer of endowed property in *Palaniappa Chetty* v. *Sreemath Devasikamony Pandara Sannadhi* (2), already quoted by us, the learned Judges expressed the opinion that "the embarking of a new and speculative trade by the *karta* of a family cannot be said to be for the benefit of the estate." This is a definite pronouncement by their Lordships of the Calcutta High Court on the very point which we have to decide, and their Lordships of the Privy Council expressed approval of the opinion. Their Lordships of the Privy Council then proceeded to give additional and more decisive reasons as to why a *karta* cannot be allowed to start a new venture. Their Lordships pointed out that a minor cannot be made a partner of a firm where a new business is going to be started by several members. The members constitute a firm and the question would be whether a minor can be made a partner. Their Lordships say that a minor could not be made a partner. Then they examine the provisions of the Contract Act, section 247, as to the meaning of a minor being admitted to the benefit of a partnership and explain that that section did not mean that a *karta* could create a liability on the property of the minor, other than the property belonging to the partnership. As already stated, the arguments employed by their Lordships are applicable to all kinds of family, irrespective of whether they are governed by the *Mitakshara* or the *Dayabhaga* law.

In this Court a few cases have been decided in recent years which may be taken as possibly going to the length of laying down that a manager of a joint family may start a new venture. Closely examined, the cases possibly do not profess to lay down such a proposition. We shall presently examine them, but if they do go to the length

(1) (1919) 23 C. W. N., 500 (505). (2) (1917) I. L. R., 40 Mad., 709.

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aforesaid, they must be taken as laying down a law contrary to the express decision of their Lordships of the Privy Council in *Sanyasi Charan's* case (1). One of these cases is *Mahabir Prasad Misr* v. *Amla Prasad Rai* (2). In this case the father of a joint family started a trade in elephants and carried it on for seven to eight years before his death. In the course of this business he wanted money and raised it by a mortgage of joint family property. While the decree was under execution, the father died and the sons objected to the execution on the ground that the property was not liable to be taken, as the mortgage was beyond the competence of the father. The court of first and second instance held in favour of the sons, but this Court allowed the appeal. The learned Judges, at page 365, put before themselves the proposition of law to be decided by them as follows :—

"The point which we have to consider is whether the amount borrowed by the manager of a Hindu family in connection with a family business is such as is binding on the other members of the family."

SULAIMAN, J., who delivered the judgement of the Court, remarked :—

"It is well understood that the manager of a Hindu family has power to contract debts for the purposes of a family business and this power is well recognized. It is not necessary that such business should be an ancestral one."

For the proposition that "it is not necessary that such business should be an ancestral one" certain cases are quoted. The passages quoted talk of "family business," an expression which would imply that it was a business in which the minor members, if there are any, are interested, by right of inheritance. Two of the cases quoted from the Bombay series of the Indian Law Reports related to ancestral business which was inherited.

(1) (1922) I. L. R., 49 Calc., 560. (2) (1924) I. L. R., 46 All., 364.

A case is quoted from Oudh and the remark is made that it was a case neither of an ancestral business nor of an ancient business, but had been started only nine to ten years prior to the debt. It is not clear whether there was a minor in the family when the business was started and whether the share of the minor in the joint family property was sought to be charged on the ground that the business out of which the debt arose had in previous years benefited the minor. The other cases, I. L. R., 1 Cal., 470; 1 Bom. H.C.R., 51; I.L.R., 5 Cal., 792, are all cases either of ancestral business or of business started by adult members without any minors in the family. A Calcutta case, *McLaren Morrison* v. *Verschoyle* (1), was quoted as laying down the rule (see p. 368 of the report in I. L. R., 46 All.) that a new business started by the head of the family would not bind the other members. This case was sought to be distinguished. The Privy Council case of *Sanyasi Charan Mandal* v. *Krishna Dhan Banerji* (2) was not quoted before their Lordships and was not considered.

In the case of *Jagmohan Agrahri* v. *Prag Ahir* (3), the facts were briefly these. There was a trading family which possessed a very small property situated some sixteen miles away from where the family resided. The yield of the property was only Rs. 69 per year, and it was found that the income was not at all sufficient for the maintenance of the family. The property was sold and the proceeds were invested in the cloth business which was being carried on by the family. It was held that, in the circumstances, the sale could not be impeached. The case is entirely different from the case before us and we need not express any opinion on that case. The decision of the Calcutta High Court, out of which the Privy Council case of *Sanyasi Charan* (2) arose, was

(1) (1901) 6 C. W. N., 429. (2) (1922) I. L. R., 49 Calc., 560.
(3) (1925) I. L. R., 47 All., 452.

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quoted before their Lordships but was held to be inapplicable.

In the case of *Jado Singh* v. *Nathu Singh* (1), it was held that a transfer of joint property by the manager in order to acquire fresh properties might be justified, if it is not a mere speculation but results in actual benefit to the estate. So far as the transfer was sought to be justified by the result, with all respect, the principle applied could not be supported on principle. It is immaterial whether the transaction entered into actually resulted in gain or loss. If the transaction, in its inception, was a justifiable one and was within the competence of the manager, it mattered little whether it miscarried and resulted in a loss. Justification cannot be dependent on the result. This case is perhaps in direct conflict with the case of *Shankar Sahai* v. *Bechu Ram* (2), quoted above. So far as the remark "the other members of the family cannot retain the benefit and at the same time repudiate the transaction by means of which that benefit has been acquired" went, the case was one of estoppel and has no application to the point that we have to decide. A minor member, if he wants to impeach a transaction entered into by the manager, cannot, certainly, retain the benefit received by the transaction. He must give up the benefit in order to succeed. SULAIMAN, J., who delivered the judgement of the Court, examined a large number of cases and came to the conclusion that the particular case before him was supportable on the ground of conferring "benefit to the estate." At page 598 his Lordship remarks as follows :—

"It is quite clear that the benefit to be conferred upon the estate was something distinct from mere need or the pressure upon it."

The need or pressure is a paraphrase of the words "*apat kale*" in the text of Brihaspati. But the

(1) (1926) I. L. R., 48 All., 592. (2) (1925) I. L. R., 47 All., 381.

next expression "*kutumbarthe,*" which we have translated as meaning "for purposes of the members of the family" and which has been translated by Colebrooke as "for the sake of the family" and which has been interpreted by their Lordships of the Privy Council as "the benefit to be conferred upon it (family or estate)," necessarily signifies an idea of "requirement" or "something called for." The idea is best expressed, if we may say so with respect, in the case of *Shankar Sahai* v. *Bechu Ram* (1), by the expression "defensive act." Preservation of the existing estate would justify an expenditure, but the idea of transferring the property in order that something better may be obtained is wholly foreign to the text. We have already stated that Vignaneshwara, before he quoted the text of Brihaspati, laid down equal rights of the father and son and then stated that, although that was the rule, it had an exception. It must be noted that Brihaspati laid down that it was in the power of any single member of the family to act in the way he indicated and was not talking of the powers of a manager as such. In other words, he laid down that although all the members of the family had equal rights, and equal rights implied that nothing could be done without the concurrence of all the members, yet in certain cases of emergency one single member could act. Such a case would, necessarily, be an exceptional case, e.g., of danger or pressure or what may be properly described as the purposes of the family. The commentator's own gloss, which we have quoted, on the text is to the same effect. The benefit therefore, contemplated by their Lordships of the Privy Council, must not be extended so as to include an act which, according to the opinion of the manager of the family, might bring in more income. The reason is simple. The *karta* is not the owner of the entire property. He

(1) (1925) I. L. R., 47 All., 381.

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is not dealing with what is his own, but is dealing with something which is his own plus something which is other people's property. This view is fully brought out in the judgement of their Lordships of the Privy Council in the case of *Sanyasi Charan* (1). We note that this case was not quoted before the learned Judges who decided the case of *Jado Singh* v. *Nathu Singh* (2). The case of *Sheotahal* v. *Arjun Das* (3) was decided before the Privy Council case of *Sanyasi Charan* (1), and the reasons do not commend themselves to us. It takes the same view as the Allahabad case of *Jado Singh* (2), discussed by us.

The judgement in *Sanyasi Charan's* case (1) clearly shows that the result of the new venture has no bearing on the question whether the venture, in its inception, could bind a minor member of the family or not. In that case, the new business flourished for some time (p. 566). It would be therefore wrong in principle to say that the actual benefit conferred on the family should be a determining factor on the authority of the manager of a joint Hindu family. A father, by selling small family property and by speculating with the proceeds, in the share market, may become very rich indeed. But, certainly, there would be no justification in Hindu law for sale by him of the family property. In the case of *Tadibulli Tammireddi* v. *Tadibulli Gangireddi* (4) it was directly and clearly laid down that the manager of a joint Hindu family had no power to commence a new trade or business without the concurrence of the adult co-parceners living at the time and that such trade or business is not binding on them in the absence of evidence of their acquiescence. Their Lordships in the course of the judgement discuss how far it is open to a *karta* of a family to bind the minor co-parceners by starting a

(1) (1922) I. L. R., 49 Calc., 560. (2) (1926) I. L .R., 48 All., 592.
(3) (1920) 56 Indian Cases, 879. (4) (1921) I. L. R., 45 Mad., 281.

new business and express themselves clearly against the authority of the *karta* (see p. 290). They draw a clear distinction between an ancestral business and a business newly started by the *karta* of the family.

It was contended on behalf of the respondents that if the head of a joint family cannot start a new business, how could, possibly, there come into existence an "ancestral family business"? The answer is perfectly clear. A business may be started at a time when there is no minor member in the family and with the consent of the sole or all the adult members. Thereafter, any minors that may come into the family will inherit or get an interest in the family business.

We have come to the conclusion that it was not open to Kharak Singh to raise money on the security of the family property in order to start a new business, namely, of plying a motor lorry for hire even if the new business was likely to bring large profits to himself and through himself to his sons.

The result is that we allow the appeal, set aside the decree of the court below and grant to the plaintiffs a decree declaring that the mortgage of the 19th of September, 1921, is not binding on the plaintiffs or any portion of the family property belonging to the plaintiffs and the defendant No. 1 jointly.

Appeal allowed.

FULL BENCH.

Before Mr. Justice Lindsay, Mr. Justice Mukerji and Mr. Justice Iqbal Ahmad.

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March, 15

MAHADEO SINGH AND OTHERS (PLAINTIFFS) *v.* TALIB ALI AND OTHERS (DEFENDANTS).*

Pre-emption—Suit for pre-emption by three plaintiffs—Suit dismissed—Appeal—Death of one plaintiff appellant pending appeal—Abatement—Custom—Effect of estate coming into the hands of a single proprietor.

A suit for pre-emption was filed by three persons, each claiming a right to pre-empt the whole of the property sold. The suit was dismissed. The plaintiffs appealed, but, pending the appeal, one of them died, and his representatives were not brought upon the record within the period of limitation.

Held, that the effect of this was not that the appeal abated but that the deceased plaintiff appellant merely dropped out, and the other two plaintiffs were entitled to continue the appeal and, if they succeeded, to obtain a decree for pre-emption. *Matbar Singh* v. *Abhai Nandan Prasad* (1), *Ambika Prasad* v. *Jhinak Singh* (2), and *Wajid Ali Khan* v. *Puran Singh* (3), overruled.

When once property comes into the hands of a single proprietor, any custom of pre-emption relating thereto must come to an end. The custom may grow up again, but its growth will have to be established by evidence. *Kamar-un-nissa Bibi* v. *Sughra Bibi* (4), followed.

THIS was an appeal arising out of a suit for pre-emption which had been dismissed, and was referred to a Full Bench on the question of what effect, if any, the death of one of the plaintiffs appellants during the pendency of the appeal would have on the rights of the others to continue the appeal. The facts

*First Appeal No. 526 of 1924, from a decree of Raja Ram, Additional Subordinate Judge of Ballia, dated the 12th of May, 1924.

(1) (1927) I. L. R., 49 All., 756. (2) (1922) I. L. R., 45 All., 286.
(3) (1924) I. L. R., 47 All., 100. (4) (1917) I. L. R., 39 All., 480.

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appear from the Referring Order, which was as follows :—

"LINDSAY and IQBAL AHMAD, JJ.—There is a preliminary matter to be considered in connection with the hearing of this appeal and until that has been decided we do not think the case ought to proceed any further, and, in order to have this matter decided, for reasons which we are now about to state we think it proper that the matter be referred for decision to a Full Bench.

The appeal which is before us arises out of a suit for pre-emption brought by three plaintiffs, Babu Mahadeo Singh, Babu Mathura Singh and Babu Ranbaz Singh.

The suit has been dismissed in the court of first instance. At the time the decree of the lower court was passed, and also at the time the appeal was filed in this Court, Babu Ranbaz Singh, the third plaintiff, was still alive. Since the appeal has been admitted, however, Babu Ranbaz Singh has died, and it is admitted before us that his legal representatives have not been brought on the record either as appellants or respondents.

We have been referred to a ruling of a Bench of this Court in *Matbar Singh* v. *Abhai Nandan Prasad* (1). In that case the facts were similar to the facts of the case now before us. The Bench decided, in circumstances similar to those which face us now, that in no case could the surviving plaintiffs have a decree for pre-emption, on the ground that the decree of the first court had become final and by doing so had declared that the deceased plaintiff had no right of pre-emption. In short, the case was put in this way, namely, that on these results the surviving plaintiffs must be taken to have associated with themselves a stranger in order to obtain a decree for pre-emption and, that being so, the whole suit was bound to fail.

If that is the true state of the case, then we should necessarily have to hold in the present case that the two surviving plaintiffs, Babu Mahadeo Singh and Babu Mathura Singh, cannot in any way succeed in this appeal and be given a decree for pre-emption. We are not, however, disposed to agree with the reasoning of the learned Judges in the case just mentioned

(1) (1927) I. L. R., 49 All., 756.

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and as the point is one of great importance and as, moreover, the valuation of the appeal now before us is a lakh of rupees, we think we are justified in asking that this matter be considered and dealt with by a larger Bench.

We therefore direct that the record be laid before the Chief Justice with the request that a Full Bench may be appointed to decide whether, in the circumstances above set out, it is correct to say that the surviving plaintiffs are in no case entitled to have a decree for pre-emption, on the ground that in their suit they have joined with themselves a person who is held not to have a right to pre-empt."

The appeal was then laid before a Bench consisting of LINDSAY, MUKERJI and IQBAL AHMAD, JJ.

Babu *Piari Lal Banerji*, for the appellants.

Sir *Tej Bahadur Sapru* and Munshi *Kamla Kant Varma*, for the respondents.

LINDSAY, J.—This case has been referred to a Full Bench by an order of reference dated the 24th of January, 1928, and the point for consideration is whether the view of the law laid down in the decision of the case of *Matbar Singh* v. *Abhai Nandan Prasad* (1) is correct or not.

It is not necessary for me to state the facts, which are all set out in the referring order. The case, as far as the facts are concerned, is on the same footing as the one to which I have just referred. The referring Bench was not prepared to accept the view of the law as laid down in the case above cited, and now the case has been argued before us. Speaking for myself, I have no doubt that the decision of the Bench in *Matbar Singh* v. *Abhai Nandan Prasad* (1) is not a correct exposition of the law. I do not wish to discuss the matter at any length, for, having read the referring order in that case which was made by my learned brother IQBAL AHMAD, J., I find that I have nothing more to say. I adopt all the arguments set out in his referring order and consider that the point

(1) (1927) I. L. R., 49 All., 756.

of law should be decided in the manner indicated by him in that order. I would, therefore, answer this reference by saying that in the circumstances of this case the surviving plaintiffs are entitled to have a decree for pre-emption, provided they succeed in their appeal to this Court.

I should like to add that the case of *Ambika Prasad* v. *Jhinak Singh* (1), which is referred to in the referring order made by my learned brother in the case of *Matbar Singh* v. *Abhai Nandan Prasad* (2), was for the reasons just given also erroneously decided, as also the case of *Wajid Ali Khan* v. *Puran Singh* (3), which is discussed in the separate judgement of my learned brother MUKERJI, J., with which I agree.

MUKERJI, J.—The point referred to the Full Bench is whether in the circumstances to be just mentioned the appeal is maintainable.

It appears that three plaintiffs, Babus Mahadeo Singh, Mathura Singh and Ranbaz Singh, instituted a suit for the purpose, *inter alia*, of pre-empting a certain property sold by the defendant second party to the defendants first party. The claim for pre-emption was dismissed by the court of first instance and the plaintiffs appealed. Pending the appeal, Babu Ranbaz Singh died and the time for his legal representatives to be brought on the record has expired without their being placed on the record. The contention of the respondent is that the whole appeal has abated and a declaration to that effect should be made. Reliance is placed on two cases to be presently mentioned.

I am of opinion that the cases of *Matbar Singh* v. *Abhai Nandan Prasad* (2), and *Ambika Prasad* v. *Jhinak Singh* (1), relied on by the respondent should be overruled

(1) (1922) I. L. R., 45 All., 286. (2) (1927) I. L. R., 49 All., 756.
(3) (1924) I. L. R., 47 All., 100.

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and that the answer to the reference should be that the death of one of the co-plaintiffs, Ranbaz Singh, pending the appeal and the fact that his legal representatives have not been brought on the record will not interfere with the right of the other plaintiffs, Mahadeo Singh and Mathura Singh, to prosecute their appeal. In the case of *Matbar Singh* v. *Abhai Nandan Prasad* (1), the short ground on which the successful plaintiffs' decree was treated as a nullity was that the joinder of the deceased plaintiff amounted to the joinder of a stranger. If the deceased plaintiff was not a stranger to start with, that is to say when the suit was instituted, if there was no finding which became final, as between the surviving parties, that the deceased was as a matter of fact a stranger, the facts that he died and his legal representatives were not brought on the record will not make him a stranger. A pre-emptor's right to pre-empt the whole of the property sold is independent of a similar right enjoyed by another person who stands in the same degree as regards the right of pre-emption as the other claimants. The fact, therefore, that two or more such claimants to a right of pre-emption join in one suit, instead of bringing separate suits of their own, can not convert the separate rights of the several plaintiffs into a joint right. Order I, rule 1, of the Code of Civil Procedure permits the plaintiffs in such cases to join in bringing one suit. If several suits had been brought and if one suit had been compromised or withdrawn by one of the plaintiffs, that fact could not have affected the other independent suits. On the same principle, the fact that one of the plaintiffs out of several has died and his legal representatives have not thought it fit to prosecute the case further, cannot affect adversely the right of the other plaintiffs.

The cases of *Matbar Singh* v. *Abhai Nandan Prasad* (1) and *Ambika Prasad* v. *Jhinak Singh* (2) were cases

(1) (1927) I. L. R., 49 All., 756. (2) (1922) I. L. R., 45 All., 286.

where the decree had become final and the dispute arose in the execution department. In each of these cases one of the successful plaintiffs had died and the decrees under execution were passed in ignorance of the fact that one of the plaintiffs was dead. It was held that the decrees were a nullity and could not be executed at the instance of the surviving decree-holders. The reasons given above will clearly establish that the surviving decree-holders were entitled to enforce the whole decree for pre-emption. In this view alone, the decisions in those cases ought to be treated as not good law. Additional reasons would easily be forthcoming to show that the whole decree could not be treated as a nullity. One of the reasons, and probably the simplest one, would be this. The effect of the death of one of the plaintiffs, whose representative was not brought on the record, would be, let us assume, the abatement of the suit or appeal if one were pending. If during the pendency of the suit or appeal, a question arose as to whether the whole suit or appeal abated or a portion of it or none of it, any decision arrived at by the court, if not appealed against, would be final as between the parties, and after the decree it would not be open to the other side to contend, especially in the execution department, that the decree passed was a wrong decree and, therefore, must be treated as a nullity. What difference in principle, then, does it make if a final decree was passed without the question of abatement being agitated by the party whose contention it is that the suit or appeal ought to have been declared as abated? If a party to a suit or appeal has a good point and does not raise it, he cannot raise it after a decree has been made and the decree has been allowed to become final. In the execution department, therefore, it is not open to an unsuccessful judgement-debtor, in a pre-emption decree passed in favour of the plaintiffs, to contend that the decree is a nullity.

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It is now necessary to refer to another case, namely, *Wajid Ali Khan* v. *Puran Singh* (1), in which a view similar to the view taken in the case of *Matbar Singh* v. *Abhai Nandan Prasad*, quoted above, was taken. The facts of the case briefly were these. Four plaintiffs brought a suit against a single vendee for pre-emption. The suit succeeded. The plaintiffs paid in the purchase money in the terms of the decree of the first court. The vendee, Wajid Ali, filed an appeal against the decree to this Court. One of the plaintiffs respondents, Amar Singh, died pending the appeal and his legal representatives were not brought on the record by the vendee. In ignorance of the fact that one of the plaintiffs was dead and his legal representatives had not been brought on the record, a decree was passed by this Court purporting to reverse the decree made by the court of first instance and dismissing the plaintiffs' suit *in toto*. Before the High Court decree was passed, delivery of possession had been ordered and effected in favour of the plaintiffs and against the vendee Wajid Ali. Wajid Ali, on his success in appeal, applied for restoration of possession and by an *ex parte* order he was put in possession. Thereupon the three surviving plaintiffs and the legal representative of the deceased plaintiff, Amar Singh, made an application to the court of first instance, asking that they should be restored to possession. Their case was that Amar Singh having died pending the appeal, the decree passed by the High Court was a nullity. The matter came up in appeal before this Court and the question arose whether the whole decree was bad. The matter came up, in the first instance, before Mr. Justice DALAL and myself. On a consideration of the provisions of the Code of Civil Procedure, order XXII, I was of opinion that the appeal should be deemed to have abated in the High Court, only to the extent of a quarter share belonging to Amar Singh

(1) (1924) I. L. R., 47 All., 100.

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and that the rest of the decree of the High Court must be taken to have become final on the principle of *res judicata* and could not be touched by the three surviving plaintiffs. My brother DALAL, J., differed from me. He was of opinion that the appeal of Wajid Ali abated as a whole. On account of this difference of opinion, the matter was referred to another Bench. Two learned Judges (DANIELS and NEAVE, JJ.) agreed with my brother DALAL, J. It appears from the perusal of my judgement and of the other learned Judges who heard the case at different times that it was never argued before us that the plaintiffs in a pre-emption suit do not claim jointly, but claim separately and each one for himself. From what I have said above I think that if this point had been argued before me I should not have had any hesitation in coming to the conclusion to which I have now arrived. In my opinion there can be no two opinions about the nature of the claim of the plaintiffs bringing a joint action for pre-emption. In such circumstances, where one of the plaintiffs dies and his legal representatives do not propose to prosecute the case or where in the case of his being a respondent in an appeal the vendee-appellant does not bring his legal representatives on the record, no question of the survival of the right to sue to the co-plaintiffs arises. The deceased simply drops out of the case. If he dies after he has obtained a decree, his legal representatives are entitled to enforce that decree to its fullest extent so far as such decree is compatible with the decree passed in appeal. On the facts of the case of *Wajid Ali Khan* v. *Puran Singh* (1), the appellate court having dismissed the suit of the three surviving plaintiffs, there was nothing to prevent the legal representatives of Amar Singh, who claimed a right independent of the other plaintiffs, from executing the whole decree

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(1) (1924) I. L. R., 47 All., 100.

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against Wajid Ali. In my opinion the case of *Wajid Ali Khan* v. *Puran Singh* (1) must be treated as bad law.

In the result, my answer to the reference would be as stated in the opening portion of this judgement.

IQBAL AHMAD, J.—For the reasons that are given in my referring order in *Matbar Singh* v. *Abhai Nandan Prasad* (2), I agree that the answer to the question referred to the Full Bench must be in the negative. In my judgement the cases of *Matbar Singh* v. *Abhai Nandan Prasad* (2), *Ambika Prasad* v. *Jhinak Singh* (3), and *Wajid Ali Khan* v. *Puran Singh* (1) were wrongly decided and must be overruled.

BY THE COURT.—Let the appeal be returned with this order to the Bench concerned.

The appeal was accordingly heard by a Division Bench, consisting of LINDSAY and BANERJI, JJ. (IQBAL AHMAD, J., having by this time left the Court), and was dismissed upon the ground—following the decision in *Kamar-un-nissa Bibi* v. *Sughra Bibi* (4)—that, the estate in suit having in 1912 come into the hands of a single proprietor, the custom of pre-emption relied upon by the plaintiffs had come to an end.

Appeal dismissed.

(1) (1924) I. L. R., 47 All., 100. (2) (1927) I. L. R., 49 All., 756.
(3) (1922) I. L. R., 45 All., 286. (4) (1917) I. L. R., 39 All., 480.

APPELLATE CIVIL.

Before Mr. Justice Lindsay and Mr. Justice Mukerji.

SOMWAR GIR (DECREE-HOLDER) *v.* MAYANAND GIR (JUDGEMENT-DEBTOR) AND MAHADEVA BHARTI (DECREE-HOLDER.)* 1928 *March*, 19.

Civil Procedure Code, order XXI, rules 58, 60 *and* 63—*Execution of decree—Attachment—Objection by judgement-debtor that property is trust property and he is in possession as* mutwalli—*Objection upheld—Remedy of decree-holder.*

The objection of a judgement-debtor to the attachment of certain property in execution of a decree against him was that, though the property sought to be attached was vested in him, it was vested in him not in his private capacity but as *mutwalli* of a *math*, and, therefore, could not be taken in execution by the decree-holder.

Held that this objection was one under order XXI, rule 58, of the Code of Civil Procedure; that the order of the court upon it was consequently an order passed under order XXI, rule 60, and that therefore the person against whom the order was passed had no right of appeal, but his remedy was by way of suit in accordance with rule 63.

Bhagwan Das v. *Mahmud Bano* (1), *Kartik Chandra Ghose* v. *Ashutosh Dhar* (2), *Ramanathan Chettiar* v. *Levvai Marakayar* (3), *Murigeya* v. *Hayat Saheb* (4), *Upendra Nath Kalamuri* v. *Kusum Kumari Dasi* (5), and *Seth Chand Mal* v. *Durga Dei* (6), referred to.

The facts of this case sufficiently appear from the judgement of the Court.

Pandit *Ambika Prasad Pande*, for the appellant.

The respondents were not represented.

*First Appeal No. 232 of 1927, from a decree of V. Mehta, Additional Subordinate Judge of Benares, dated the 7th of March, 1927.

(1) (1923) 75 Indian Cases, 1053. (2) (1911) I. L. R., 39 Calc., 298.
(3) (1899) I. L. R., 23 Mad., 195. (4) (1898) I. L. R., 23 Bom., 237.
(5) (1914) I. L. R., 42 Calc., 440. (6) (1889) I. L. R., 12 All., 313.

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LINDSAY and MUKERJI, JJ. :—This professes to be an execution first appeal on behalf of a decree-holder, Mahant Somwar Gir. Mr. *Pande* has appeared for the appellant; the opposite side is not represented.

The first question we have to consider is whether an appeal lies.

The facts of the case are as follows :—The decree-holder appellant obtained a simple money decree against the judgement-debtor on the 17th of February, 1926. Execution was applied for in May, 1926, and as the result of this there were attached certain properties—zamindari, house property etc., as also certain decrees which had been obtained by the judgement-debtor against third parties.

On the 16th of June, 1926, the judgement-debtor put in an objection to the attachment of certain house property mentioned in list B. His plea was that this property was not liable to attachment and sale in execution of the decree obtained against him by Mahant Somwar Gir, because it was not his personal property at all but was property belonging to a *math*. In substance the objection was to the effect that this house property was in the possession of the judgement-debtor as a trustee for the *math*.

This objection was dismissed for default on the 20th of November, 1926. On the same day the judgement-debtor's counsel asked for restoration of the case, but this application was refused on the ground that order IX, rule 9, did not apply to proceedings in execution of decree.

After this an application was made for review of judgement and it seems this was entertained by the court below and finally allowed. The court held that the house property belonged to the *math* and was not liable to be attached and sold in execution of Mahant Somwar

Gir's decree. The decree-holder now comes up in appeal.

It appears to us, having regard to the circumstances of this case and to the nature of the objection which was put forward by the judgement-debtor in the court below, that this is not a case in which an appeal is allowable. It seems to us that the objection which the judgement-debtor preferred to the attachment and sale was one under order XXI, rule 58, and consequently the order of the court below which is now under appeal before us must be deemed to be an order under rule 60 of order XXI. If that is so, it follows that the person against whom this order has been passed has no remedy by way of appeal. His remedy is by way of a suit (see order XXI, rule 63).

Mr. *Pande*, however, has contended on behalf of the decree-holder that this application of objection ought not to be treated as having been made under order XXI, rule 58, at all. His case is that it was an objection raised under section 47 and that the order of the court below must therefore be treated as a decree and liable to be appealed from.

We are unable to accept this contention, although it finds support in a recent case of the Oudh Chief Court, *Shah Naim Ata* v. *Girdhari Lal* (1). In this case a number of previous authorities are discussed and in particular there is an examination of the Full Bench decision of the Calcutta High Court in *Kartik Chandra Ghose* v. *Ashutosh Dhar* (2). Their Lordships of the Chief Court found themselves unable to accept the view which was taken in this Full Bench decision. We find, however, that there is a great mass of authority against the view which is taken by the Chief Court. Leaving aside the Calcutta Full Bench decision to which reference

(1) (1927) I. L. R., 2 Luck., 145. (2) (1911) I. L. R., 39 Calc., 298.

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has just been made, we find that a similar view was taken in *Ramanathan Chettiar* v. *Levvai Marakayar* (1), *Murigeya* v. *Hayat Saheb* (2), *Budrudeen* v. *Abdul Rahim* (3), *Upendra Nath Kalamuri* v. *Kusum Kumari Dasi* (4) and *Sheikh Nazir Hussain* v. *Muhammad Ejaz Hussain* (5).

We would also refer to the Full Bench case of this Court—*Seth Chand Mal* v. *Durga Dei* (6). In that case it was held that where the legal representative asserts that the property is his own and has not come to him from the deceased judgement-debtor, he cannot set up a *jus tertii* so as to come in under section 278 and the following sections of the Code. He can only do so where he opposes execution against any particular property on the ground that, although it is vested in him, it is vested in him not beneficially by reason of his being the representative of the judgement-debtor but as trustee or executor of some one else; in that case either party may have the question of *jus tertii* determined in a separate suit.

If that is true of a case in which the capacity of the legal representative of a judgement-debtor to raise a *jus tertii* was under consideration, we see no reason why such a plea is not open to the judgement-debtor himself.

The authorities were examined in a recent judgement of a single Judge of this Court in *Bhagwan Das* v. *Mahmud Bano* (7). There Mr. Justice KANHAIYA LAL held that in objecting to attachment of certain properties in the execution of a decree under order XXI, rule 58, of the Code of Civil Procedure, if the objector claims the property as the *mutwalli* of a trust he does not do so as a representative of the judgement-debtor, even though

(1) (1899) I. L. R., 23 Mad., 195. (2) (1898) I. L. R., 23 Bom., 237.
(3) (1908) I. L. R., 31 Mad., 125. (4) (1914) I. L. R., 42 Calc., 440.
(5) (1922) I. L. R., 1 Pat., 637. (6) (1889) I. L. R., 12 All., 313.
(7) (1923) 75 Indian Cases, 1053.

the author of the trust may himself have been the judgement-debtor, except where such trust is created after the suit or the decree passed therein. We think the view taken by Mr. Justice KANHAIYA LAL is right and is supported by authority. It seems to us that in cases of this kind a judgement-debtor may fill two totally distinct legal characters. He may have property of which he is the beneficial owner. On the other hand, he may also be in possession of property which he holds in trust on behalf of a third party. If this latter property is attached in the execution of a decree obtained personally against him he is surely entitled to apply to the court and say that the property which is being attached is not really his property at all but belongs to a third party for whom he is holding as a trustee, and an examination of the language of order XXI, rule 60, supports this conclusion, for there it is said that if the court on investigation finds "that property which is in the possession of the judgement-debtor at such time is so in his possession not on his own account or as his own property, but on account of or in trust for some other person, the court shall make an order releasing the property wholly or to such extent as it thinks fit from the attachment." It seems plain to us that a question of this kind may be raised by the judgement-debtor himself and that in such cases he is not raising it as judgement-debtor but in a totally different legal character, namely, that of a trustee for a third person. In this view, therefore, we are of opinion that no appeal can be entertained against the order of the court below in the present case.

We have been asked to treat this present appeal as an application for revision of the order of the lower court, the ground taken being that the lower court had no jurisdiction to entertain and allow the application for review of judgement. We have no doubt that the ground upon which the court below allowed the review was not a

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good ground in law, but it cannot be said that there is any ground for revision. We cannot revise the order of the lower court merely because it came to an erroneous conclusion on a question of law raised before it. We think, therefore, this appeal fails and it is dismissed. No order as to costs, as the opposite party is not represented.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice King.

1928 *March*, 20.

HAR SWARUP *v.* MUHAMMAD SIRAJ.*

Act No. XXV of 1867 (*Press and Registration of Books Act*), *section* 7—*Newspaper*—"*Declared printer*"—*Responsibility of printer for defamatory matter printed in a paper*—*Act No. XLV of* 1860 (*Indian Penal Code*), *section* 500.

Primâ facie the person who is the "declared printer" of a newspaper is responsible for every thing that is printed in it. He can, however, escape liability by showing that he was absent *bonâ fide*, that is, not with the purpose of evading responsibility, when a particular article complained of was printed. But if he does so, he is bound to give evidence as to who the actual printer of the paper in his absence was. *Emperor* v. *Phanendra Nath Mitter* (1), followed.

THE facts of this case sufficiently appear from the judgement of the Court.

Pandit *Madanmohan Nath Raina*, for the applicant.

The opposite party appeared in person.

*Criminal Revision No. 279 of 1923, from an order of H. G. Smith, Sessions Judge of Meerut, dated the 10th of December, 1927.

(1) (1908) I. L. R., 35 Calc., 945.

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HAR SWARUP v. MUHAMMAD SIRAJ.

MEARS, C.J., and KING, J.—This is an application for the revision of an order passed by the Sessions Judge of Meerut, dated the 10th of December, 1927, setting aside the conviction of Muhammad Siraj under sections 500 and 501 of the Indian Penal Code, and the sentence of fine of Rs. 50 passed in respect of each offence.

The facts of the case were briefly as follows:—On the 24th of June, 1927, an article appeared in the "Risalat", which is a weekly newspaper published in Meerut, containing imputations calculated to harm the reputation of Lala Har Swarup, a respectable landholder and banker of Mowana in the Meerut district. He instituted criminal proceedings against the editor and printer of the "Risalat", charging them with defamation. The Magistrate found that the editor, Muhammad Nazir, and the declared printer, Muhammad Siraj, were guilty of defamation under section 500 of the Indian Penal Code and further found them guilty of subsidiary offences under sections 502 and 501 of the Indian Penal Code, respectively.

For the purpose of this application it is unnecessary to consider whether the publication of the article did or did not constitute an offence under section 500 of the Indian Penal Code.

Muhammad Siraj is the declared printer of the "Risalat", but his defence was that he was absent from Meerut at the time when the defamatory article was printed. It was printed by another person during his absence and he knew nothing whatever about it until he received a notice from the complainant. He produced evidence, which has been accepted by the trying Magistrate, proving that he was in fact at Delhi at the time when the issue of "Risalat" dated the 24th of June, 1927, was printed. He also produced a witness who deposed that he had printed that issue of the

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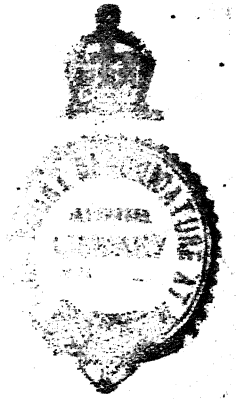
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"Risalat" during the absence of Muhammad Siraj. The Magistrate, however, held that although the printer had proved his absence from Meerut on the date when the paper was printed, nevertheless his absence could not absolve him of his liabilities as a declared printer of the newspaper unless he could show that he left a "responsible man" in charge of his work in his absence, and that he had not produced any evidence to prove which "responsible man" was in charge of his work during his absence. The Magistrate, therefore, found him guilty of technical offences under sections 500 and 501 of the Indian Penal Code.

In appeal before the learned Sessions Judge the same argument was raised on behalf of Muhammad Siraj, namely, that he was not criminally liable for printing the offending article since he was *bonâ fide* absent from Meerut on the date of the printing, and the ruling of the Calcutta High Court in *Emperor* v. *Phanendra Nath Mitter* (1) was cited as an authority for the contention that his conviction was not justified. This argument was accepted by the learned Judge. He held that the accused was not merely absent from Meerut on the date of printing, but that he was "*bonâ fide* absent", in the sense that he knew nothing of the article in question, and did not know that it would be printed in his absence. In the Calcutta ruling, upon which the learned Sessions Judge relied, Mr. Justice RAMPINI, in his charge to the jury, refers to the provisions of section 7 of Act XXV of 1867, which lays down that a declaration made by a person that he is the printer of a newspaper shall be sufficient evidence (unless the contrary be proved) as against that person that he was the printer of every portion of every issue of the newspaper named in the declaration. He pointed out that the effect of this section is to throw upon the declared printer the onus of

(1) (1908) I. L. R., 35 Calc., 945.

proving that in fact he was not the printer of any issue of the newspaper which may form the subject-matter of legal proceedings. He explained to the jury that no doubt absence in good faith and without knowledge of the seditious articles would be sufficient evidence to the contrary, but not absence in bad faith. He goes on to explain what he means by absence in bad faith.



In the present case there is no evidence whatever to suggest that Muhammad Siraj, the declared printer, was absent in bad faith, i.e., that he knew that a defamatory article was about to be printed, and that he merely absented himself with a view to escaping liability. We must take it, therefore, that Muhammad Siraj was absent in good faith and without knowledge of the defamatory article. Under the law, as laid down in the Calcutta ruling, this was sufficient for his acquittal, and in our opinion the law is correctly set forth in that ruling. When the declared printer of a newspaper pleads absence in good faith he should, we think, prove who was in fact the printer of the newspaper in his absence. If he seeks to escape his presumptive responsibility, then he should show who was in fact responsible. This is just what Muhammad Siraj has done in the present case. The defence witness Abdul Rahman clearly states "I printed the issue dated the 24th of June, 1927, of the 'Risalat' in my press" and thereby accepts whatever liability may attach to the printer. Muhammad Siraj has therefore fully discharged the onus of proving that he was not the printer of the issue in question.

The learned Sessions Judge was right in acquitting Muhammad Siraj and we dismiss the application for revision.

Application rejected.

REVISIONAL CIVIL

Before Mr. Justice Lindsay.

1928
March, 27.

RAM CHARAN, BANWARI LAL (PLAINTIFF) *v.* KISHORI LAL, RAM SARUP (DEFENDANT).*

Civil Procedure Code, section 24 (4)—*Transfer of Small Cause Court suit to court not having Small Cause Court powers —Appeal.*

During the pendency of a suit before a Subordinate Judge having Small Cause Court powers, the Subordinate Judge was transferred and was replaced by another Subordinate Judge who had not such powers. The suit was then transferred, by order of the District Judge first to the Munsif, and then to the Additional Munsif, by whom it was tried. *Held* that section 24 (4) of the Code of Civil Procedure applied and no appeal lay from the decision of the Additional Munsif. *Kauleshar Rai* v. *Dost Muhammad Khan* (1), followed. *Dulal Chandra Deb* v. *Ram Narain Deb* (2), and *Madhusudan Gope* v. *Behari Lal Gope* (3), referred to.

THE facts of this case are fully stated in the judgement of the Court.

Munshi *Shambhu Nath Seth*, for the applicant.

Munshi *Kailas Chandra Mital*, for the opposite party.

LINDSAY, J.—This is an application for revision under section 115 of the Code of Civil Procedure and the ground taken is that the judgement and decree of the lower appellate court are nullities because no appeal lay to the Additional Subordinate Judge.

The facts of the case are as follows:—The firm of Ram Charan, Banwari Lal, who are the applicants here, brought a suit against another firm carried on in the name of Kishori Lal, Ram Sarup. The suit was for the

*Civil Revision No. 16 of 1928.

(1) (1883) I. L. R., 5 All., 274. (2) (1904) I. L. R., 31 Calc., 1057.
(3) (1918) 27 C. L. J., 461.

recovery of Rs. 386 odd and was filed in the court of Mr. Zia-ul-Hasan, who was the Subordinate Judge of Farrukhabad with Small Cause Court powers to try suits of a value not exceeding Rs. 500.

Before the suit could be decided Mr. Zia-ul-Hasan was transferred from Farrukhabad to Cawnpore. He was succeeded in office by Mr. Shankar Lal, a Subordinate Judge, but it so happened that Mr. Shankar Lal was not invested with the powers of a Small Cause Court Judge. It became necessary, therefore, for some arrangements to be made to effect the disposal of the suits which had been filed in Mr. Zia-ul-Hasan's court as Small Cause Court Judge. The suit with which we are concerned now was transferred, first to the court of the Munsif of Farrukhabad, and subsequently to that of the Additional Munsif, who finally decided it. The order for the transfer of the case was made apparently by the learned District Judge. I find endorsed on the order-sheet of the suit an order over the signature of Mr. Shankar Lal indicating that the case was being sent to the court of the Munsif of Farrukhabad in accordance with an order of transfer passed by the District Judge.

The Additional Munsif having decided the case, an appeal was filed and in the lower appellate court the ground was taken that, regard being had to the provisions of section 24 of the Code of Civil Procedure, no appeal lay. Section 24 (4) lays down that a court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for purposes of such suit, be deemed to be a Court of Small Causes. If that sub-section applies to the present case, and I think it does, then it is clear that the Additional Munsif who decided the suit as the trial court must be treated as a Court of Small Causes, and there would have been no appeal against his decision.

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It has been suggested that there is nothing to show that the suit was transferred under the provisions of section 24 (4), but it appears to me that there is no other authority under which the District Judge could have transferred the case.

The Judge of the lower appellate court before whom this question of jurisdiction was raised came to the conclusion that section 24 (4) could not apply because, as he says, the Court of Small Causes had ceased to exist as soon as Mr. Zia-ul-Hasan had given over charge and left the district. Consequently the Judge says that at the date the order of transfer was passed there was no court in existence. If that be so, the question might very well be asked how was it possible for the District Judge to transfer a case from a court which did not exist to a court which did exist. That was the question which was asked in the case of *Kauleshar Rai* v. *Dost Muhammad Khan* (1). That case is exactly in point here, the facts being exactly the same. The learned Judges were of the opinion that a suit transferred under circumstances similar to those with which I am now concerned was a suit finally tried by a Judge who was a Small Cause Court Judge. In the course of their judgement their Lordships observed as follows :—

> "It was contended for the plaintiff that the suit was not withdrawn from a Court of Small Causes as that court had gone out of existence at the time of the Judge's order; but this argument is without force. The suit was on the register of a competent Small Cause Court which was in existence when the suit was lawfully instituted therein. If the suit was not withdrawn from that court, from what court was it withdrawn? Not from that of the late Subordinate Judge, on whose register the suit as a matter of fact had never been entered and could not legally have been entered as an original suit under the mandatory provisions of section 15 of the Civil Procedure Code."

(1) (1883) I. L. R., 5 All., 274.

This case has never been dissented from, as far as my knowledge goes, except in the case of *Dulal Chandra Deb* v. *Ram Narain Deb* (1), but this latter case in turn has been dissented from by another Bench of the Calcutta High Court whose judgement is to be found in *Madhusudan Gope* v. *Behari Lal Gope* (2).

The decision of the lower appellate court that it had jurisdiction to entertain this appeal is erroneous. In my opinion it is clearly established that the court had no such jurisdiction, and that being so, effect must be given to this application for revision.

I allow the application and set aside the decree of the lower appellate court. The decree of the court of first instance is restored. The applicant is entitled to his costs both in this Court and in the lower appellate court.

Application allowed.

APPELLATE CIVIL.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Lindsay.

SITA RAM DUBE AND OTHERS (DEFENDANTS) *v.* RAM SUNDAR PRASAD AND OTHERS (PLAINTIFFS).*

1928 *March*, 27

Civil Procedure Code, order XXI, rule 96—Purchase of undivided share at a sale in execution—Delivery of formal possession—Suit for actual possession—Limitation—Act No. IX of 1908 (Indian Limitation Act), schedule 1, article 142.

In the case of auction purchase of an undivided share in joint property the only possession which can be delivered is joint possession, and that can be done only as provided by order XXI, rule 96, of the Code of Civil Procedure. Where this has been done, and the judgement-debtor still continues in

*Appeal No. 37 of 1926, under section 10 of the Letters Patent.

(1) (1904) I. L. R., 31 Calc., 1057. (2) (1918) 27 C. L. J., 461.

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actual possession along with the other co-owners, limitation in respect of a suit to obtain actual possession by means of physical partition of the share purchased begins to run against the purchaser from the date of delivery of formal possession. *Rajendra Kishore Singh* v. *Bhagwan Singh* (1) and *Jang Bahadur Singh* v. *Hanwant Singh* (2), followed.

THE facts of this case are fully stated in the judgement of the Court.

Munshi *Haribans Sahai* and Munshi *Shiva Prasad Sinha*, for the appellants.

Dr. *M. L. Agarwala*, for the respondents.

MEARS, C. J., and LINDSAY, J.—The question for decision in this appeal is one of limitation. The trial court and the first appellate court dismissed the plaintiff's suit on the ground that it was barred by time. The learned Judge of this Court, whose judgement is before us in appeal, was of the contrary opinion: he has held that the suit was within time and has given the plaintiff a decree for possession.

The facts to be considered are these. The predecessor in title of the plaintiff obtained a simple money decree against the grandfather of the first defendant, a minor named Babban Dube. In execution of this decree he brought to sale and purchased an undivided one-third share of a house which was owned jointly by his judgement-debtor and certain others who are now represented by the defendants Nos. 2 to 8.

The purchase was made in the year 1900 and the purchaser, on the 16th of March, 1903, was given formal possession over his one-third joint share in the manner provided by order XXI, rule 96, of the Code of Civil Procedure.

The judgement-debtor, notwithstanding this, continued in actual physical possession of the house along with his former co-owners, who were his relations.

(1) (1917) I. L. R., 39 All., 460. (2) (1921) I. L. R., 43 All., 520.

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In 1916, the purchaser brought a suit for partition against the other co-owners and obtained a decree for the separation of his one-third share, and in 1917 he applied to be placed in actual possession of his separated share. This application was opposed on behalf of the present defendant No. 1 on the ground that he was in actual possession and was not bound by the partition decree to which he was not a party. The objection of the first defendant was sustained, with the result that the plaintiff brought the present suit on the 13th of April, 1921, claiming actual physical possession of the one-third share. The suit was framed as a suit for recovery of possession after dispossession by the first defendant. The plaintiff, claiming to have been in possession since the time of his purchase, pleaded that he was dispossessed in September, 1917, when the first defendant "interfered with his possession"; and again on the 29th of June, 1918, when his application for possession under the partition decree was shelved by the executing court.

The defence was that the suit was barred under article 142 of the Limitation Act because the plaintiff had not been in possession within 12 years from the date of the suit.

The finding of fact of the lower appellate court, which was binding upon the Judge of this Court in second appeal, was that there was no reliable evidence to show that the plaintiff or his predecessor had ever enjoyed physical possession of any portion of the house since the time of his purchase. The only possession he could show was the formal possession obtained on the 16th of March, 1903, in the manner stated above.

On this finding the suit was dismissed as time-barred.

The learned Judge of this Court, in reversing the decree of the first court of appeal, observes in his judgement that there was no proof of adverse possession of the

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first defendant prior to the partition suit of 1916. He remarks in this connection that the one-third interest acquired by the plaintiff was " never in fact ascertained "—and that the plaintiff as purchaser could not possibly oust his judgement-debtor " unless he obtained the co-operation of the other owners and took formal proceedings for that purpose." He came to the conclusion, therefore, that there had been no ouster before the share was " ascertained " by the partition suit in 1916, and that limitation could not have begun to run earlier than the date of the partition decree.

In our opinion no question of adverse possession arose for determination in the suit; such a question does not arise in a suit to which article 142 of the schedule to the Limitation Act applies. It is not for the defendant to such a suit to raise and prove adverse possession in order to show that the suit is time-barred. The plaintiff has to prove possession and dispossession within a period of 12 years prior to the suit. In the case now before us the plaintiff failed to prove this and his suit was, therefore, rightly dismissed.

The judgement of the learned Judge of this Court is not in accord with the principles laid down in the following two cases of this Court :—*Rajendra Kishore* v. *Bhagwan Singh* (1) and *Jang Bahadur* v. *Hanwant Singh* (2). In those cases it was held that where possession has been delivered to a purchaser in execution in accordance with law, that would, as between the parties to the proceedings for delivery of possession, give a new start for the computation of limitation, and the possession of the defendant (i.e., the judgement-debtor) would be deemed to be a fresh invasion of the plaintiff's rights and a new trespass upon the property.

In the case of purchase of an undivided share in joint property the only possession which can be delivered

(1) (1917) I. L. R., 39 All., 460. (2) (1921) I. L. R., 43 All., 520.

is joint possession and that can be done only as provided by order XXI, rule 96, of the Code of Civil Procedure. That was what was done in the case now before us and it follows that limitation began to run against the plaintiff from the 16th of March, 1903, when he obtained formal delivery.

From that date he became entitled to seek actual possession of the one-third share he had purchased, by demanding a partition. There was no need for him to wait for the co-operation of the other joint owners for this purpose : he could have got a separation of his share by impleading them as defendants in a suit for partition. Any co-owner of joint property can call for partition at any time as long as co-ownership exists.



It is not correct to say that the one-third share acquired by the plaintiff was not " ascertained ". The share, a one-third share, was certainly ascertained, though it had not been physically defined by a partition by metes and bounds.

As we have said, the question of adverse possession did not at all arise, but it may be observed that if the judgement-debtor, in spite of the formal delivery of possession to the plaintiff, retained actual possession, as has been found, it is difficult to see how his possession could be otherwise than adverse. The execution sale had put an end to his title—he ceased to be a co-owner of the property, and his occupation after that would be that of a trespasser upon the joint possession of all the co-owners. And if they failed to oust him before the expiry of 12 years, their title as joint owners would becomes extinguished with regard to any portion of the property so held adversely. And it would follow that after the lapse of 12 years in such a case the joint owners could not, in a suit for partition, include any portion of the property to which their joint title had been lost. Joint owners,

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by delaying to sue together for ejectment of a trespasser in wrongful possession of a portion of the joint property, or by delaying to have partition in order to assert their separate rights to actual possession in accordance with their shares, cannot stop the running of time in favour of the trespasser.

For these reasons we hold that the plaintiff's suit was time-barred as was held by the first appellate court. We allow this appeal, set aside the decree of the learned Judge of this Court and restore the decree of the first appellate court. The appellants to have their costs of this appeal.

Appeal allowed.

Before Mr. Justice Sulaiman and Mr. Justice Kendall.

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April, 2.

ANRUDH KUMAR AND ANOTHER (DEFENDANTS) *v.* LACHHMI CHAND (PLAINTIFF).*

Act No. IX of 1872 (*Indian Contract Act*), *sections* 72 *and* 73—*Obligation resembling contract—Compensation due under the Land Acquisition Act*, 1894, *paid by mistake to the wrong person—Duty of person receiving such payment to refund—Interest.*

Certain compensation which would have been due to one *B* under the provisions of the Land Acquisition Act, 1894, had he survived, was paid by mistake to *AK* on the supposition that he was the legal representative of *B*. It was afterwards found that *AK* was not the legal representative of *B*, but that one *LC* was.

Held that sections 72 and 73 of the Indian Contract Act applied. *AK* was bound to refund to *LC* the money paid to him by mistake, and, as he had for a considerable period avoided payment thereof, he was properly chargeable with interest for the time during which the money had been withheld.

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*First Appeal No. 379 of 1925, from a decree of Saiyid Abdul Hasan, Subordinate Judge of Dehra Dun, dated the 30th of June, 1925.

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Held, also, that illustration (*n*) to section 73 of the Indian Contract Act, 1872, is not exhaustive and cannot be considered as co-extensive with the provisions of the section itself. *Jwala Prasad* v. *Hoti Lal* (1) and *Abdul Saffur Rowther* v. *Hamida Bivi Ammal* (2), referred to.

THE facts, material for the purpose of this report, were briefly as follows :—Lachhmi Chand, plaintiff, had two brothers, Mohar and Baldeo, and they were all separate. The defendant Anrudh Kumar was the son of Mohar. On the 24th of August, 1920, Baldeo died as a separated owner. Mohar having predeceased him, Lachhmi Chand would be entitled to succeed to the estate. Anrudh Kumar, who was not the heir-at-law, apart from alleging jointness, set up a will in his favour. In the lifetime of Baldeo some land had been acquired by the Government under the Land Acquisition Act, and he died while the proceedings were pending. A sum of Rs. 33,000 and odd was awarded as compensation for the property so acquired. On the 14th of March, 1921, this amount was paid to Anrudh Kumar, who claimed to be the heir of the deceased Baldeo. A suit was instituted by Anrudh Kumar against Lachhmi Chand, which was decided on the 18th of June, 1921, by the first court. It found that the family was separate and that the will which had been set up by Anrudh Kumar was a forgery. This decision was ultimately affirmed by the High Court on the 27th of November, 1924.

In 1923, Lachhmi Chand brought a suit against Anrudh Kumar, in which the relief claimed by the plaintiff was for a decree for the principal sum due, together with interest from the 14th of March, 1921, to the 17th of September, 1923, the date of filing the suit, at 6 per cent. per annum, by way of damages. Anrudh Kumar, in his written statement, mainly pleaded that he was not liable to pay interest on the amount claimed by the

(1) (1924) I.L.R., 46 All., 625. (2) (1919) I.L.R., 42 Mad., 661.

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plaintiff. The Subordinate Judge decreed the claim with the interest. The defendant appealed.

Dr. *Kailas Nath Katju*, for the appellants.

Babu *Piari Lal Banerji* and Munshi *Shambhu Nath Seth*, for the respondents.

The judgement of the Court (SULAIMAN and KENDALL, JJ.), after stating the facts set out above, thus continued :—

The appeal of Anrudh Kumar must be dismissed. The only point that has been urged on his behalf is that he should not have been made liable to pay interest on the amount which had been paid over to him in the land acquisition proceedings. There can be no doubt that Anrudh Kumar set up a forged will in his favour, and it was on the strength of that forged document that he succeeded in recovering Rs. 33,000 and odd which were due to the estate of Baldeo, by falsely alleging that he was his legal representative. Anrudh Kumar has had the use of this money for all these years. When it was found that the document on which his claim was based was forged and he had no legal title whatsoever, it was clearly his duty to repay the amount taken out by him. The plaintiff was driven to carry on a protracted litigation against Anrudh Kumar up to the appellate court before he succeeded finally in exposing the spurious character of the document set up by Anrudh Kumar. The present suit was instituted within three years of the date when the money was taken out by Anrudh Kumar, and, indeed, even before the disposal of the appeal in the High Court. If one were to proceed on grounds of justice, equity and good conscience, one would have no hesitation in allowing the plaintiff compensation for the withholding of this amount for all these years. The learned advocate for the appellants, however, contends that interest can be allowed only if the grounds of the case are to be found

either in the Interest Act of 1839 or section 73, illustration (*n*), of the Indian Contract Act. In this view he relies strongly on the case of *Jwala Prasad* v. *Hoti Lal* (1), which undoubtedly supports him. We might however point out that it is not quite accurate to state that the grounds must be found in section 73, illustration (*n*), of the Contract Act. The illustration of course is not exhaustive and cannot be co-extensive with the provision in the section itself. The view taken by the Madras High Court in the case of *Abdul Saffur Rowther* v. *Hamida Bivi Ammal* (2) is that interest can be allowed on equitable grounds even if the case does not fall within the statutory enactments. The learned Judges of the Madras High Court relied on three cases decided by their Lordships of the Privy Council, which they thought indicated that interest could be allowed on principles of equity, justice and good conscience. It is not necessary for us to decide this point in this case, as in our opinion the present case comes within the four corners of the provisions of the Indian Contract Act.

Chapter V, which deals with certain relations resembling those created by contract, contains section 72, under which a person to whom money has been paid or anything delivered by *mistake* or under coercion must repay or return it. There is no doubt here that the amount of compensation money was paid to Anrudh Kumar under the mistaken belief that he was the legal representative of Baldeo who had been entitled to this amount. There was thus a legal obligation on Anrudh Kumar to repay or return this amount. Section 73, paragraph 3, of the Indian Contract Act provides that when an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default as if such person had

(1) (1924) I.L.R., 46 All., 625. (2) (1919) I.L.R., 42 Mad., 661.

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contracted to discharge it and had broken his contract. This paragraph speaks of an obligation resembling those created by contract, and not necessarily a completed contract as is mentioned in illustration (*n*) to this section. Reading sections 72 and 73 together we have no doubt in our minds that the obligation on Anrudh Kumar to repay or return the amount was one resembling that created by a contract. When the Land Acquisition officer made the payment to him it was undoubtedly understood that the payment was made to him as representing the estate of Baldeo, whose property had been acquired by Government. If that supposition was wrong there was an obligation on the payee to refund the amount to the true heir. The present suit was instituted by Lachhmi Chand, who has been found to be the lawful heir entitled to this amount. We are, therefore, of opinion that the plaintiff should be allowed compensation for the withholding of the amount from him for all this period. The court below has fixed the ordinary court rate of interest at 6 per cent. per annum as a reasonable rate of compensation, which we think was quite fair.

The result, therefore, is that the appeal of Anrudh Kumar is dismissed with costs. He will pay the full costs of the plaintiff in the court below and one-sixth of the costs of the plaintiff in this Court and will bear his own costs.

Appeal dismissed.

Before Mr. Justice Sulaiman, Acting Chief Justice, and Mr. Justice Kendall.

RAM NARAIN AND ANOTHER (PLAINTIFFS) v. NANDRANI KUNWAR AND OTHERS (DEFENDANTS).* 1928 *April*, 10.

Hindu law—Hindu widow—Alienation—Legal necessity—What evidence may be sufficient to support an alienation challenged after a considerable lapse of time.

Recitals in a deed of sale with regard to the existence of legal necessity for an alienation by a Hindu widow are not in themselves evidence of such necessity without substantiation by evidence *aliunde*. But, though the onus lies upon the legal representatives of the transferee to prove the necessity for the sale, when it is challenged after a considerable lapse of time, full and detailed evidence cannot be expected, and in such circumstances presumptions are permissible to fill in the details which have been obliterated by time.

Furthermore, it is not absolutely necessary for a transferee to establish the actual existence of family necessities, or to show that the money advanced by him was utilized for such purposes. It is only necessary that a representation should have been made to the purchaser that such necessity existed and that he should have acted honestly and made proper inquiry to satisfy himself of its existence. The recital in the document is clear evidence of a representation, and if the circumstances are such as to justify a reasonable belief that an inquiry would have confirmed its truth, then, when proof of actual inquiry has become impossible, the recital coupled with such circumstances would be sufficient evidence to support the deed.

Brij Lal v. *Inda Kunwar* (1), *Venkata Reddi* v. *Rani Saheba of Wadhwan* (2), and *Banga Chandra Dhur Biswas* v. *Jagat Kishore Acharjya Chowdhuri* (3), referred to.

THIS was a suit for recovery of possession of property which was transferred so long ago as the 16th of

*First Appeal No. 411 of 1925, from a decree of C. Deb Banerji, Subordinate Judge of Bareilly, dated the 17th of July, 1925.

(1) (1914) I.L.R., 36 All., 187. (2) (1919) I.L.R., 43 Mad., 541.
(3) (1916) I.L.R., 44 Calc., 186.

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January, 1865, under a sale-deed executed by Musammat Chunni, the mother, and Musammat Tursa Kunwar, the widow, of Jawahir Lal, deceased, whose reversioners the present plaintiffs were. The Subordinate Judge found that the sale could not have been without legal necessity, and the transferees had discharged the burden that lay on them. Their suit having been dismissed by the court of first instance, the plaintiffs appealed.

Maulvi *Iqbal Ahmad* and Babu *Surendra Nath Gupta*, for the appellants.

Babu *Piari Lal Banerji* and Munshi *Parmeshwar Sahai*, for the respondents.

THE judgement of the Court (SULAIMAN, A. C. J., and KENDALL, J.), after stating the facts as above, thus continued :—

The fact that this is a very old transaction, as to which oral evidence has by mere lapse of time become almost extinct, is patent. It would be very hard on the representatives of the original transferee to expect complete and exhaustive evidence showing the way in which the money obtained by the ladies was utilized for purposes of necessity.

The deed, however, contains an express recital to the effect that decretal amounts of certain named creditors and others were due by the executants' ancestor, and they had borrowed money under bonds and promissory notes from Chhote Lal and made payments to those creditors. The sale consideration, which was Rs. 4,000, was set off against the entire amount which had been so borrowed for the payment of the debts. The executants acknowledged that they had applied the amount towards the payment of their ancestral debts. Recitals in a deed of sale with regard to the existence of legal necessity for an

alienation by a Hindu widow are not in themselves evidence of such necessity, without substantiation by evidence *aliunde*: *Brij Lal* v. *Inda Kunwar* (1). But even though the *onus* lies upon the legal representatives of the transferee to prove the necessity for the sale, yet, having regard to the great lapse of time, it would not be reasonable to expect that full and detailed evidence would be forthcoming as to the state of things which gave rise to the sale-deed in question, as would be the case if alienations made at more or less recent dates were concerned. In such circumstances presumptions are permissible to fill in the details which have been obliterated by time: *Venkata Reddi* v. *Rani Saheba of Wadhwan* (2). Furthermore, it is not absolutely necessary for a transferee to establish the actual existence of family necessities, or to show that the money advanced by him was utilized for such purposes. It is only necessary that a representation should have been made to the purchaser that such necessity existed and that he should have acted honestly and made proper inquiry to satisfy himself of its existence. The recital in the document is clear evidence of a representation, and if the circumstances are such as to justify a reasonable belief that an inquiry would have confirmed its truth, then, when proof of actual inquiry has become impossible, the recital coupled with such circumstances would be sufficient evidence to support the deed: *Banga Chandra Dhur Biswas* v. *Jagat Kishore Acharjya Chowdhuri* (3).

We have, therefore, to consider whether the circumstances of this case are such as would justify us in holding that the recital contained in the sale-deed was correct and that the representation made to the transferee was true, or that reasonable inquiry would have shown that it was well-founded.

(1) (1914) I. L. R., 36 All., 187. (2) (1919) I.L.R., 43 Mad., 541.
(3) (1916) I.L.R., 44 Calc., 186 (196).

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[Their Lordships then proceeded to discuss the evidence on these points, and the judgement thus continued] :—

This being the state of affairs of the family, there is no ground for suspecting that the recital in the sale-deed of 1865 was false and had been made intentionally with some ulterior motive. After a lapse of 60 years the defendants have succeeded in showing that at least Rs. 3,000 out of Rs. 4,000 would have been due to Chhote Lal. Under these circumstances they cannot be expected to lead complete evidence showing the necessity for the entire sum of Rs. 4,000. That a representation was made to him by the two widows is clear from the deed itself. That Musammat Jhamman Kunwar, the daughter of Jawahir Lal, who remained alive till 1921, did not seek to get the deed avoided in her lifetime is also a circumstance which cannot altogether be ignored. The other reversioners, viz., the ancestors of the present plaintiffs also did not think it fit to obtain a declaration that this transfer would not be binding on the reversioners beyond the lifetime of the widows. They have waited for all these years and now call upon the great-grandsons of Chhote Lal, the original transferee, to justify the alienation. In view of the pronouncements of their Lordships of the Privy Council we agree with the view taken by the court below that the defendants have under the circumstances of this case discharged the burden which lay upon them. The mere fact that Chhote Lal was connected with the ladies through the marriage of his son or that he belonged to the legal profession can at best raise a mere suspicion in one's mind, which cannot be made the basis for a finding that he had, either through undue influence over the widows or in some other improper way, managed to get entered in the sale-deed false recitals for the protection of his own family. In view of the long interval of

time the evidence no doubt is meagre, but we are convinced that no case has been made out for interference with the decree of the court below.

We accordingly dismiss this appeal with costs.

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RAM NARAIN v. NANDRANI KUNWAR.

Before Mr. Justice Sulaiman, Acting Chief Justice, and Mr. Justice Kendall.

KRISHNA DAS AND OTHERS (DECREE-HOLDERS) *v.* RAM GOPAL SINGH AND OTHERS (OPPOSITE PARTIES.)*

1928 *April*, 18.

Civil Procedure Code, section 68; *schedule III, paragraph* 1—*Execution of decree—Execution transferred to Collector —High Court not competent to interfere with Collector's orders, even though erroneous.*

When a decree has been transferred to a Collector for execution under the provisions of section 68 of the Code of Civil Procedure, it is not competent to the High Court to interfere with the orders passed by him even though they may be obviously not warranted by the provisions of schedule III, paragraph 1, of the Code. *Shahzad Singh* v. *Hanuman Rai* (1), and *Girdhari Lal* v. *Jhaman Lal* (2), followed. *Mahadaji Karandikar* v. *Hari D. Chikne* (3), referred to.

THE facts of this case sufficiently appear from the judgement of the Court.

Pandit *Uma Shankar Bajpai*, for the appellants.

Dr. *N. C. Vaish*, for the respondents.

SULAIMAN, A. C. J. and KENDALL, J. :—This is an appeal by the decree-holders arising out of execution proceedings. A final decree for sale was passed on the 30th of April, 1919, in favour of the appellants against the respondents. The property ordered to be sold was found to be ancestral property, with the consequence

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*First Appeal No. 40 of 1927, from a decree of Hanuman Prasad Verma, Subordinate Judge of Benares, dated the 13th of November, 1926.

(1) (1924) I.L.R., 46 All., 562. (2) (1926) 25 A. L. J., 197.
(3) (1883) I.L.R., 7 Bom., 332.

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that the civil court, under section 68 of the Code of Civil Procedure, transferred the execution of the decree to the Collector. The decree was for about Rs. 11,000, and the Collector accepted payment of Rs. 6,000 and granted a lease of the property for a period of 12 years, directing that the lease money at the rate of Rs. 500 a year should be paid towards the discharge of the decretal amount. He also reduced the rate of interest from 6 per cent. to 5 per cent. The decree-holders sought to get this order revised in appeal by the Commissioner, but failed. An application to the Board of Revenue also was infructuous.

The decree-holders then applied to the execution court praying that all proceedings taken by the Collector may be set aside and the decree-holders may be permitted to take out execution afresh. The learned Subordinate Judge has held that the Collector's procedure was not in accordance with schedule III, paragraph 1, of the Code of Civil Procedure and has allowed the application, so far as the Collector's order related to the reduction of interest, but has declined to do anything further. The decree-holders have appealed, but the respondents have submitted to the order.

There can be no doubt that the order of the Collector was not justified by the provisions of schedule III. His jurisdiction was limited to the powers conferred upon him by that schedule. Paragraph 1 only could apply to a mortgage decree for sale. Paragraph 2 and the provisions of some of the subsequent paragraphs were inapplicable because the decree was not a simple money decree. Under paragraph 1 (*b*) he could raise the amount of the decree by letting any property for a term on payment of a premium, but that implied the raising of the whole of the decretal amount within a reasonable time. It did not permit of payment by instalments, which even

a civil court had no power to direct. It is also clear that the Collector had no jurisdiction whatsoever to reduce the amount of the decree by reducing the rate of interest.

The learned advocate for the respondents has to concede that the order of the Collector was not in compliance with the provisions of paragraph 1. Had the attention of the Collector been drawn to rule 978 of chapter 40 of the Manual of the Revenue Department, he would undoubtedly have not granted a lease for such a long period.

But the first question before us is whether we have any jurisdiction to interfere in the matter. The learned advocate for the appellants contends that the execution court, which had transferred the execution, had power to recall the record and rectify any mistake that might have been committed. In support of his contention he relies on the case of *Mahadaji Karandikar* v. *Hari D. Chikne* (1) and a remark of MUKERJI, J., in the case of *Shahzad Singh* v. *Hanuman Rai* (2), where it was said that the court could recall the papers.

No doubt it is possible to conceive of contingencies when the civil court may order that the papers which had been transmitted to the Collector should be recalled. But what the appellants want is that the papers should be recalled and the proceedings set aside. This would amount to an interference with the procedure adopted by the Collector.

We are of opinion that the civil court has no jurisdiction to interfere with the orders of the Collector in such a case. In special cases an appeal to the Commissioner is provided for under the rules made by the Local Government, but once the execution of the decree has been transferred, the civil court cannot interfere

(1) (1883) I.L.R., 7 Bom., 332. (2) (1924) I.L.R., 46 All., 562.

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with the orders passed by the Collector or rectify mistakes committed by him. Indeed, rule 12 of chapter IV of the General Rules for the subordinate courts clearly provides that a civil court has no power to interfere with the procedure of a Collector in the execution of a decree which has been transferred to him under section 68.

We cannot, therefore, under the guise of calling for the record from the Collectorate, nullify the proceedings taken there. Nor does it appear that the calling for of the record would put an end to all that has been done previously.

Our view finds support from the decisions of this Court in the cases of *Shahzad Singh* v. *Hanuman Rai* (1) and *Girdhari Lal* v. *Jhaman Lal* (2).

In this view of the matter we must dismiss the appeal, which is dismissed accordingly.

Appeal dismissed.

Before Mr. Justice Mukerji and Mr. Justice Weir.

1928
April, 19.

NABI-UN-NISSA BIBI (DEFENDANT) *v.* LIAQAT ALI AND ANOTHER (PLAINTIFFS) AND KHAIR-UN-NISSA BIBI AND OTHERS (DEFENDANTS.)*

Muhammadan law—Waqf—Waqf *not invalid for the sole reason that the first* mutwalli *is a minor.*

A *waqf*, otherwise valid, will not fail for the sole reason that the *mutwalli* appointed by the *waqif* is a minor. *Piran* v. *Abdool Karim* (3), *Muhammad Nasim* v. *Muhammad Ahmad* (4), *Khatun Begam* v. *Ejaz Ahmad* (5), and *Raza* v. *Ali* (6), referred to..

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*Second Appeal No. 1140 of 1925, from a decree of A. G. P. Pullan, District Judge of Moradabad, dated the 30th of April, 1925, reversing a decree of Girish Prasad, Third Subordinate Judge of Moradabad, dated the 29th of August, 1924.

(1) (1924) I.L.R., 46 All., 562.
(2) (1926) 25 A.L.J., 197.
(3) (1891) I.L.R., 19 Calc., 203,
(4) (1914) 27 Indian Cases, 389.
(5) (1916) 15 A.L.J., 132.
(6) (1916) I.L.R., 40 Mad., 941.

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NABI-UN-NISSA BIBI v. LIAQAT ALI,

THE facts of this case were as follows:—One Irfan Ali purported to create a *waqf* of his property by a deed dated the 11th of June, 1918. This *waqf* was meant mostly for the benefit of his wives and children. He directed that one-thirtieth part of the income of his property should go for the benefit of two schools. On the death of Irfan Ali, the elder of his two widows sued the remaining heirs of her late husband for her dower. The result was a compromise, by which certain portions of the property left by Irfan Ali were given to her in satisfaction of a portion of her dower, and she was permitted to proceed, by way of execution, against other portions of the *waqf* property. Thereupon, the managers of the two institutions which were to benefit, in part, by the *waqf*, instituted this suit to obtain a declaration that the *waqf* was a valid and good one and was binding on all concerned.

The suit was contested by the elder widow alone. She pleaded, *inter alia*, that the *waqf* was bad in law inasmuch as the *mutwalli* appointed by the *waqif* was a minor, namely his son Muzaffar Ali, and that the *waqf* was never acted upon.

The court of first instance came to the conclusion that the *waqf* was invalid and was never acted upon, and dismissed the suit. On appeal by the plaintiffs, the District Judge came to the conclusion that the *waqf* was a genuine one, that it had been acted upon, and that it was not void because the first *mutwalli* appointed was a minor; and the suit was, accordingly, decreed. The defendant appealed to the High Court.

Mr. *B. E. O'Conor*, Maulvi *Iqbal Ahmad* and Maulvi *Mukhtar Ahmad*, for the appellant.

Mr. *A. M. Khwaja* and Dr. *Kailas Nath Katju*, for the respondents.

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THE judgement of the Court (MUKERJI and WEIR, JJ.), after setting forth the facts, thus continued :—

In this Court two points have been argued. The first point is that the *mutwalli* appointed being a minor, the *waqf* was invalid in law. The second point argued was that, in any case, the learned judges of the lower courts should have addressed themselves to the question whether the *waqf* was not calculated and meant to defeat the just rights of the appellant for her dower.

On the first question. We have not been referred to any clear authority where it may have been held that if a *waqif* appointed a minor as the first *mutwalli*, the *waqf* should become void. The high authority of Mr. Ameer Ali, to be found in his book, supports the conclusion arrived at by the court below. The relevant portions of his book (4th Edition, Volume 1) have been quoted by the learned District Judge and will be found at pages 446 and 447. At the top of page 446 there occurs the following sentence :—

"If the *waqif* appoints a minor as *mutwalli* and no adult is associated with him, the *Qazi* shall appoint some person to do the work until the minor attains majority. If there is an adult associated with the minor, the *Qazi* may appoint some person to represent the minor and act jointly with the *co-mutwalli*, or may empower the adult *mutwalli* to act for the minor."

This is a quotation from Radd-ul-Mukhtar, Volume 3, pages 593—596. Again, at page 447, the learned author quotes from Surrat-ul-Fatawa as follows :—

"If the *towliat* has been entrusted by the *waqif* to a boy, his *towliat* will remain in abeyance (or ineffective) until he attains majority when the trust will be made over to him."

These quotations clearly show that a *waqf* cannot fail simply because a *mutwalli* happens to be a minor at the time. Indeed the authorities go so far as to indicate that a *waqf* shall not fail even if the *mutwalli*

appointed be absent from the place. At page 447 an authority is quoted which lays down as follows :—

"If the *waqif* appoints as *mutwalli* a person who is absent, the *Qazi* has the power of nominating in his place another for the time being, and when the *mutwalli* appointed by the *waqif* arrives, the trust will revert to him."

There can be no doubt that the Muhammadan jurists were fully alive to the importance of the doctrine that a *waqf* or trust should never fail for want of a trustee. They have fully given effect to this doctrine in their writings.

The learned counsel for the appellant has quoted four cases in support of his contention that if the first *mutwalli* appointed by the *waqif* should happen to be a minor the *waqf* should be regarded as invalid. The first case is *Piran* v. *Abdool Karim* (1). That is a case where the person who was appointed *mutwalli* was not only to be *mutwalli* but was also to be a spiritual head of an institution. In other words, he was to be a *sajjada-nashin* as well as a *mutwalli*. Mr. Justice AMEER ALI pointed out that a *sajjada-nashin* was not only to manage a property but he was to perform the services of a spiritual preceptor, a "pir" or a "guru". In the circumstances, it was found that the appointment of a minor was not proper. We do not think that the case lends support to the view contended for.

The next case is that of *Muhammad Nasim* v. *Muhammad Ahmad* (2). The question that arose in this case was whether the defendant was rightly removed by the District Judge from his position of a *mutwalli* and whether the District Judge was right in appointing a major in his place. On appeal the Judicial Commissioners of Oudh upheld the appointment and laid down that a person who was not *sui juris* and who required a guardian to look after his property could

(1) (1891) I. L. R., 19 Calc., 203. (2) (1914) 27 Indian Cases, 389.

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not be entrusted with the management of a trust. This was laid down as a matter of general law and not as a matter of Muhammadan law. The next case, *Khatun Begam* v. *Ejaz Ahmad* (1), can hardly be said to be in point. The head-note reads as follows :—

"When the office of a *mutwalli* devolves on a minor by virtue of a provision in the trust deed, the appointment will remain in abeyance until he attains majority, but it is the duty of the civil court, as representing the authority of the state, formerly administered by the *Qazi*, to appoint some person to perform the duties of the office until the minor comes of age."

This case does not directly deal with the point before us, namely, whether initially a *mutwalli* may be appointed to manage a *waqf* property, the *mutwalli* being a minor.

The last case cited by the learned counsel is *Raza* v. *Ali* (2). In this case, in a suit for administration of a trust a scheme was framed by the High Court. According to that scheme, there was a managing committee of five members, including the president and three *mutwallis*, and it was arranged that vacancies in the committee were to be filled by election. In filling up one of the vacancies a minor was appointed a *mutwalli*. This was not approved of by the High Court in the case quoted. The reason is perfectly clear. The appointment was under a scheme and not under the Muhammadan law. In framing the scheme the High Court never considered that a minor might fill one of the appointments.

On an examination of the authorities, therefore, there is no ground for holding that a *waqf* must fail because the first *mutwalli* is a minor. It will be remembered that in this case the *waqif* took the precaution of appointing a guardian of the minor *mutwalli*

(1) (1916) 15 A.L.J., 132. (2) (1916) I.L.R., 40 Mad., 941.

selected by him. For all practical purposes, therefore, there was a person duly qualified who could look after the trust property. We hold that the *waqf* is good.

The next question is whether the *waqf* is bad as being intended and calculated to defeat the just claims of the appellant. Although the point was specifically taken in the written statement, it does not appear that it was pressed in either of the courts below . ****In the grounds of appeal taken in this Court the point has not been specifically taken.* * * * In the circumstances, we do not feel justified in remanding the suit for deciding a fresh issue. The result of our remanding an issue like that would probably be that a mass of doubtful evidence would be put forward on behalf of the appellant—evidence which was never put forward in the earlier part of the case, although a specific plea had been taken.

The result is that the appeal fails and is hereby dismissed with costs.

Appeal dismissed.

REVISIONAL CIVIL.

Before Mr. Justice Weir.

CHANDRIKA LAL AND OTHERS (DEFENDANTS) *v.* SAMI NATH AND ANOTHER (PLAINTIFFS.)*

1928 *April*, 20.

Civil Procedure Code, order XXIII, rule 1—Withdrawal of suit with liberty to bring fresh suit—"Formal defect" —Revision.

Where a court allowed a plaintiff to withdraw his suit with liberty to bring a fresh one upon the ground that he had not given formal proof of a document which was essential to his success, it was *held* that the court was within its jurisdiction, and that the High Court should not interfere.

*Civil Revision No. 64 of 1928.

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CHANDRIKA LAL v. SAMI NATH.

Jhunku Lal v. *Bisheshar Das* (1), followed. *Baijnath Pande* v. *Babban Pande* (2), distinguished.

THE facts of the case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Pandit *Debi Prasad Malaviya*, for the applicants.

Munshi *Ram Nama Prasad* and Munshi *Binod Bihari Lal*, for the opposite parties.

WEIR, J. :—This is an application to revise an order of the Additional Subordinate Judge of Gorakhpur by which he granted to the opposite party permission to withdraw a suit which they had brought against the applicants, and granted them liberty to bring a fresh suit. The ground on which permission was granted was that the opposite party had not put in evidence a mortgage decree under which they had purchased the land in suit. The learned Subordinate Judge ordered them to pay the costs of the applicants. In the course of the argument I have been referred to several decisions. In my opinion I am bound by (and I shall follow) the decision of a two Judges Bench of this Court, namely, *Jhunku Lal* v. *Bisheshar Das* (1). In that case the plaintiff was permitted to withdraw his suit and to bring a new suit, the ground being that he had failed to give formal proof of a document which was essential to his success. The only other case which I need notice is a decision of a Judge of this Court in *Baijnath Pande* v. *Babban Pande* (2). In that case an order of the Judge granting the plaintiff permission to withdraw from a suit and to institute a fresh suit was set aside. The grounds on which the order was made were that the plaintiff had not produced sufficient evidence and that he thought that, if he had more time, he would be able to produce evidence which would counteract the documentary evidence produced by the defendant. That

(1) (1918) I.L.R., 40 All., 612. (2) (1927) I.L.R., 49 All., 459.

appears to me to be an entirely different case from the present. There is, in my opinion, a marked distinction between a case where a plaintiff wants to get time in order to produce a large body of fresh evidence to counteract evidence given by the defendant *i.e.*, where the plaintiff wants time to prepare what would be more or less a new case, and a case where, as here and in *Jhunku Lal* v. *Bisheshar* Das (1), a plaintiff merely wishes to give formal proof of a document. I, therefore, decline to interfere in revision, as I think that the Additional Subordinate Judge had jurisdiction to act as he did. The application is dismissed with costs.

Application dismissed.

Before Mr. Justice Weir.

GOVIND PRASAD (PLAINTIFF) *v.* HAR KISHAN AND OTHERS (DEFENDANTS.)* 1928 *April*, 20.

Civil Procedure Code, order IX, rule 3—Suit dismissed and application to restore it dismissed—Competence of plaintiff to bring a fresh suit on the same cause of action.

A suit in a Court of Small Causes was dismissed because, on the date fixed for hearing, neither party appeared. The plaintiff applied for restoration of the suit; but his application was dismissed.

Held that it was competent to the plaintiff to file a fresh suit on the same cause of action. *Daya Shankar* v. *Raj Kumar* (2), and *Bhudeo* v. *Baikunth* (3), approved.

THE facts of this case sufficiently appear from the judgement of the Court.

Munshi *Shabd Saran*, for the applicant.

Pandit *M. N. Kaul*, for the opposite parties.

WEIR, J. :—This is an application by the plaintiff in a civil suit to revise an order of the Small Cause

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*Civil Revision No. 70 of 1928.

(1) (1918) I.L.R., 40 All., 612. (2) (1916) 20 Oudh Cases, 66.
(3) (1921) 63 Indian Cases, 289.

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GOVIND PRASAD v. HAR KISHAN.

Court Judge of Meerut dismissing the plaintiff's suit. The facts are these. The plaintiff, who is the applicant in these proceedings, brought a suit against the defendants, who are the respondents in these proceedings, on the 20th of May, 1927. That suit was dismissed under order IX, rule 3, in consequence of neither party having appeared when the suit was called for hearing. The plaintiff applied to the learned Judge on the 3rd of September, 1927, to have the suit restored, and the learned Judge dismissed that application. The plaintiff then brought a new suit upon the same cause of action on the 17th of October, 1927. In that suit the learned Judge has passed the following order :—

"The application for restoration was dismissed. The present suit is not maintainable. Dismissed with costs."

In my opinion the learned Judge was clearly wrong in holding that the plaintiff was not entitled to bring a second suit, when an application to restore his first suit had been dismissed. Two authorities have been cited to me, namely, *Daya Shankar* v. *Raj Kumar* (1) and *Bhudeo* v. *Baikunthi* (2). I entirely agree with the learned Judge who decided both those cases, and I, therefore, set aside the order of the Small Cause Court Judge and direct him to proceed with the trial of the suit No. 6390 of 1927.

The application is allowed. Costs will be costs of the case.

Application allowed.

(1) (1916) 20 Oudh Cases, 66.

(2) (1921) 63 Indian Cases, 239.

FULL BENCH.

Before Mr. Justice Boys, Mr. Justice Kendall and Mr. Justice Sen.

1928
April, 24.

MIAN BAKHSH *v.* BODHIYA.*

Act No. X of 1923 (*Indian Paper Currency Act*), *section* 25—*Promissory note payable on demand to lender or bearer or to order—Note invalid—Question whether a suit on an independent obligation will lie and to what extent the note may be used as evidence.*

Held that a promissory note payable on demand to the lender or the bearer or to order offends against the provision of section 25 of the Paper Currency Act, 1923, and therefore cannot form the basis of a suit.

Held, by BOYS and KENDALL JJ., that the payee can, however, sue on the basis of any obligation, whether antecedent to or arising simultaneously with the execution of such a promissory note, independently of the execution of the promissory note, *Hedayat Ali Beg* v. *Nga Kyaing* (1), *Shanmuganatha Chettiar* v. *Srinivasa Aiyar* (2), *Chidambaram Chettiar* v. *Ayyasawmi Thevan* (3), *Nachimuthu Chetty* v. *Andiappa* (4), and *Natarajulu Naiker* v. *Subramanian Chettiar* (5), referred to. *Held, also*, that where there is other evidence outside the promissory note of the obligation sued upon, such a promissory note would be admissible as evidence to be read in conjunction with that other evidence to arrive at a decision as to whether the independent obligation is proved. Where there is no other evidence, while the promissory note is still admisible in evidence, there can be no decree on the basis of it alone.

THIS was a reference made by the Munsif of Fatehpur under the provisions of order XLVI, rule 1, of the Code of Civil Procedure. The case came originally before a Bench consisting of BOYS and ASHWORTH, JJ., at whose instance it was referred to a Full Bench and then laid before a Bench consisting of BOYS, KENDALL and SEN, JJ.

*Miscellaneous Case No. 1254 of 1927.

(1) (1914) 24 Indian Cases, 721. (2) (1916) 35 Indian Cases, 219.
(3) (1916) I.L.R., 40 Mad., 585. (4) (1917) 42 Indian Cases, 706.
(5) (1922) I.L.R., 45 Mad., 778.

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The parties were not represented.

THE facts of the case are fully stated in the judgement of BOYS, J.

BOYS, J. (KENDALL, J., concurring.—This is a reference by the Munsif of Fatehpur under order XLIV, rule 1. He has referred two suits, one No. 350 and one No. 310. The Munsif himself states that in suit No. 350 an appeal will lie, and there is, therefore, no power in him to make the reference. But in suit No. 310 no appeal lies, and it was open to him to make the reference, and we have to entertain it. Notices have been served on the parties and nobody appears.

The learned Munsif states the question referred as follows :—

"Whether a promissory note made payable to bearer on demand offends against the provisions of section 25 of the Indian Paper Currency Act, No. X of 1923 "?

"Is such a promissory note void and inadmissible in evidence and cannot be the basis of a claim in any court of law "?

He states that promissory notes payable to bearer on demand are a common form of promissory note occurring in the district of Fatehpur, and that "at least about 100" of such promissory notes are the basis of suits pending in his court.

The promissory note in question, after reciting that the executant has taken a certain sum in cash from one Muhammad Bakhsh, continues :—"*Indul-talab dain ko ya hamil ko ya unke hukm par mai sud bashart do rupiya saikra mahwari ta roz wasul ada karunga.*" This, though not grammatically worded, is in plain terms a promissory note payable on demand to the lender or the bearer or to order.

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MIAN BAKHSH v. BODHIYA.

Boys, J.

The questions propounded by the Munsif can best be answered by separating them into four questions :—

(1) Is the promissory note in question forbidden by law?

(2) If the promissory note is forbidden by law, can it form the basis of a suit?

(3) If the promissory note cannot form the basis of a suit, can the obligation, as existing independently of the promissory note, be sued upon (if any such obligation exists,—a question to be determined on the facts of the case)?

(4) Is the promissory note admissible in evidence, and if so, for what purpose and to what extent?

The Indian Paper Currency Act, X of 1923, section 25, says :—"No person. . . . shall draw etc., ... any. . . . . promissory note . . . . for the payment of money payable to bearer on demand."

First question.—Is the promissory note in question forbidden by law? There can be no doubt but that this document is a promissory note, see Act XXVI of 1881 (Negotiable Instruments Act), section 4. It is an instruction in writing (not being a bank note or currency note) containing an unconditional undertaking to pay a certain sum to a certain person or to the order of that person or to bearer. It also clearly contains a term rendering the executant liable to pay the amount specified in it to the bearer on demand. As such, it is forbidden by section 25 of Act X of 1923. The only exception to the prohibition contained in section 25 is to be found in the proviso where such a document is drawn on a banker, shroff or agent by the customer or a constituent of the drawee in respect of deposits of money in the hands of

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such person, etc. This document was not so drawn, and therefore the benefit of that exception does not enure to it. The only other type of promissory note payable to bearer on demand permitted by law is a promissory note drawn by Government. Such a promissory note is provided for in section 3 of Act X of 1923, and they are described therein as currency notes. Such promissory notes section 25 of Act X of 1923 does not forbid, for they are not drawn by any "person". The promissory note in question is, therefore, clearly forbidden by law. The learned Munsif was himself quite clear upon this point, and in his order of reference to this Court has stated the case very clearly. I answer his reference on this point in the affirmative. The promissory note is contrary to law.

Second question.—If the promissory note is forbidden by law, can it form the basis of a suit? Section 10 of the Contract Act enacts as follows :—

"All agreements are contracts, if they are made . . . . . for a lawful consideration and with a lawful object and are not hereby expressly declared to be void."

In this case there can be no question but that the object of the contract was lawful. The object of the borrower was to secure the loan to him of a sum of money. The object of the lender was to secure to himself the repayment of that money at a certain rate of interest. There was clearly nothing unlawful in the object of either party. Was then the consideration lawful? As the matter presents itself to me, the consideration received by the borrower was a sum of money, and in that consideration there was clearly nothing unlawful. But the consideration received by the lender was a promissory note of a certain description. There is nothing to show that he would have accepted a promissory note in any other form. If he were asked "What consideration did you

receive when you lent your debtor that sum of money?", what reply could he give other than "I received this promissory note"? Now, the promissory note I have already held to be in a form forbidden by law. In other words, the consideration received by the lender was an unlawful consideration. Section 23 of the Contract Act expressly declares that the consideration of an agreement is lawful unless it is forbidden by law. This leads us to the clear result that the agreement between the parties was void. The plaintiff cannot, therefore, sue on the basis of that agreement.

Third question.—If the promissory note cannot form the basis of a suit, can the obligation, as existing independently of the promissory note, be sued upon (if any such obligation exists,—a question to be determined on the facts of the case)?

It has sometimes been suggested that there may be some difference in the answers to be given to this question, dependent upon whether the obligation in regard to which the promissory note purported to be executed was an obligation existing antecedent to the promissory note (e.g., where the amount of the promissory note represented the balance due or part of the balance due on a running account) or whether it came into existence simultaneously with the promissory note (e.g., where the taking of a loan was the occasion of the execution of the promissory note). In *Hedayat Ali Beg* v. *Nga Kyaing* (1), the conclusion was approved that "where a loan exists independently of the bill or note, that is, where a promissory note is executed for a debt which already exists, the plaintiff can succeed on the original consideration". In that case no question arose as to whether plaintiff could sue on an obligation which came into being simultaneously with the execution of the promissory note.

(1) (1914) 24 Indian Cases, 721.

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Boys, J.

But the question was specifically considered in *Shanmuganatha Chettiar* v. *Srinivasa Aiyar* (1). There Mr. Justice ABDUR RAHIM said :—

"Where there exists an antecedent debt and a promissory note is executed for such a debt, a suit on the promissory note failing, an action on the debt would lie. The whole contention is that because the advance of money and the execution of the promissory note were simultaneous, a suit would lie only on the promissory note and not on the debt evidenced by it. There seems to be nothing in reason in support of such a distinction."

I also find myself unable to find any basis for such a distinction. The answer could not possibly be made to depend upon sworn testimony as to whether the cash consideration passed a month, a week, an hour, or five minutes before the note was executed or exactly simultaneously with the affixing of the signature to the note. The real question to be considered is, not whether the obligation existed prior to the execution of the promissory note or came into existence simultaneously with the creation of the promissory note, but whether, ignoring the existence of the promissory note altogether, there is evidence, admissible evidence, of an obligation. The problem has been stated, and in my view correctly, in *Chidambaram Chettiar* v. *Ayyasawmi Thevan* (2), in which Mr. Justice OLDFIELD used the phrase :—"Whether there was any obligation apart from the note"; and Mr. Justice KRISHNAN—"If there is an obligation apart from one under the note *itself*, it may clearly be enforced."

For instance, where the plaintiff can prove that on a balance of account a sum is due to him he can sue on that obligation, ignoring the fact that in regard to it or part of it an unlawful promissory note was executed.

(1) (1916) 35 Indian Cases, 219. (2) (1916) I.L.R., 40 Mad., 585.

Similarly, if he has evidence, whether oral or otherwise, independent of the promissory note, that he made a loan of a sum of money to the defendant on the condition that the money would be repaid on demand with certain interest, he can sue on that obligation, ignoring the existence of the promissory note. Nor in this latter case can it be said that section 91 of the Evidence Act will stand in his way. The terms of no "contract" have in this case been reduced to the form of a document, for, *ex hypothesi*, the agreement embodied in the promissory note was not enforceable by law and was therefore not a "contract". Nor, without unduly straining language, could the transaction be described as "a disposition of property".

Boys, J.

The three cases to which reference has already been made, and also the cases of *Nachimuthu Chetty* v. *Andiappa* (1) and *Natarajulu Naicker* v. *Subramanian Chettiar* (2), which are discussed in the judgement of my learned brother, are ample authority, if authority be necessary, for the proposition that an obligation which exists, and as to which there is evidence independent of the promissory note, can form the basis of a suit, despite the fact that the promissory note is in an unlawful form and cannot form the basis of a suit.

The question whether any obligation exists apart from the note is a question the answer to which must of course depend on the facts of the case and will be determined by the trial court.

In one of the cases, *Shanmuganatha Chettiar* v. *Srinivasa Aiyar* (3), it was said :—

"It may be open to the parties to show that it was intended that the debt should become merged in the negotiable instrument executed for it, but no such case was sought to be made here."

(1) (1917) 42 Indian Cases, 706. (2) (1922) I.L.R., 45 Mad., 778.
(3) (1916) 35 Indian Cases, 219 (221).

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MIAN BAKHSH v. BODHIYA.

BOYS, J.

In other words, it was suggested that there might in some cases be room for an issue as to whether the independent obligation was merged in the obligation under the promissory note, but it is difficult to see how an obligation independently existing could be merged in an agreement which has been held to be an unlawful agreement and therefore void.

Fourth question.—Is the promissory note admissible in evidence, and, if so, for what purpose and to what extent?

In only two of the cases above referred to was the question of admissibility in evidence adverted to. It appears to me incumbent on us to answer this reference not only by saying whether the document is admissible or not in evidence, but also to indicate to what extent and for what purpose it is admissible, if admissible at all. In *Nachimuthu Chetty* v. *Andiappa* (1) Mr. Justice SPENCER and Mr. Justice KRISHNAN said :—

"We may observe that there is nothing in law to prevent a note offending against section 26 (of Act II of 1910) being admitted in evidence as an acknowledgment."

And again the same Judge, Mr. Justice SPENCER, sitting with Mr. Justice DEVADOSS in *Natarajulu Naicker* v. *Subramanian Chettiar* (2), said :—

"The real consideration for the hypothecation bonds is the first defendant's indebtedness ascertained by the settlement of accounts, of which the promissory notes are evidence, and the liability for the debts will remain even if the notes are unenforceable." . . .

"There is no provision of law making promissory notes in a prohibited form inadmissible in evidence . . . . . They are admissible in evidence as acknowledgments."

(1) (1917) 42 Indian Cases, 706.

(2) (1922) I. L. R., 45 Mad., 778 (784).

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BOYS, J.

It may be open to question whether it is desirable as a matter of public policy that a document which is in a form expressly prohibited by law should be admissible for any purpose whatever, but I also am unable to find any express provision of the law altogether prohibiting admission in evidence of a document such as the promissory note in question. I do not, therefore, feel justified in holding that the document is inadmissible in evidence.

Where there is other evidence, oral or documentary, of the obligation, I find no reason for holding that the promissory note, properly proved, is not admissible, and the fact of its having been written must be weighed with the other evidence to arrive at a determination whether any obligation existing independently of the execution of the promissory note is proved. It may be noted here that this proposition does, where the arising of the debt is simultaneous or practically simultaneous with the execution of the document, seem to go very near allowing proof of the obligation or part at least of the obligation created by the note; but that is only because, being simultaneous, the obligation independent of, and the obligation purporting to be created by, the promissory note must obviously be nearly or wholly identical. But the obligation which is being proved is nevertheless the independent obligation.

Where there is no such other evidence, for instance, where a son finds a promissory note among his deceased father's papers and, though able to prove the handwriting of the executant, has no other evidence as to the circumstances in which it came to be written, then, while the promissory note is still in law admissible in evidence, there can be no decree on the basis of it alone.

There is no legitimate distinction between the recital in the document (if in fact there be such a recital) that the executant had received a certain sum of money and

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any other statement in the document as to the conditions under which the money was taken, e.g., the promise to pay and the rate of interest; all such statements are equally "facts."

To give a decree on the basis of those statements alone would be to give a decree on the basis of the execution of the document and that cannot, as already stated, be done.

I would return the following answers :—

(1) The promissory note in question is in a form forbidden by law.

(2) The promissory note in question cannot form the basis of a suit.

(3) The plaintiff can sue on the basis of any obligation, whether antecedent to or arising simultaneously with the execution of the promissory note, independently of the execution of the promissory note.

(4) Where there is other evidence outside the promissory note of the obligation sued upon, the promissory note in question is admissible as evidence to be read in conjunction with that other evidence to arrive at a decision as to whether the independent obligation is proved. Where there is no other evidence, while the promissory note is still admissible in evidence, there can be no decree on the basis of it alone.

SEN, J.—This is a matter which comes up on a reference by the learned Munsif of Fatehpur under section 113 of the Code of Civil Procedure. The powers of the subordinate judiciary to make a reference for the opinion of the High Court are hedged in by certain conditions and limitations which are to be found in

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order XLVI, rule 1, of the Code of Civil Procedure. A right of reference is fundamentally different from a right of appeal. The former vests in the court, and the latter vests in the suitor. This Court cannot entertain a reference from a subordinate civil tribunal unless certain requisite conditions are fulfilled and it is necessary that the reference should be made in a pending suit or appeal arising out of a suit in which no appeal or further appeal is permissible, and that it should relate to a question of law on which the court making the reference has a reasonable doubt.

The reference has been made in two cases, Nos. 350 and 310. In suit No. 350 the reference is clearly untenable, because the decision in the said suit is open to appeal. In suit No. 310 there is no right of appeal and the questions formulated are clearly questions of law. But the order of reference does not clearly indicate that the learned Munsif entertained any reasonable doubts as to the solution of these questions. On two out of the three points raised, he has stated his opinion without any hesitation. On the third point, as to the admissibility of the document in controversy, he does not state that he has any reasonable doubts. The jurisdiction of this Court in the matter of a reference under section 113 being of a very limited character, all the circumstances must be brought out clearly to attract the jurisdiction of this Court. I was inclined to hold that the reference did not fulfil the conditions required by law, but since my learned colleagues are of opinion that from the general tenor of the statement submitted by the Munsif it may be inferred that the Munsif did entertain reasonable doubts on the questions raised by him, I would, out of deference to their opinion, proceed to deal with the reference without being too technical and without any further canvassing about its form and outer trappings.

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The suit which has given rise to this reference was brought on a promissory note, the terms of which need not be reproduced in detail. But it was a promissory note payable on demand to the lender or the bearer or to order. It answers the definition of a promissory note given in section 4 of the Negotiable Instruments Act (Act XXVI of 1881). It has been provided in section 1 that "nothing in this Act affects the Indian Paper Currency Act, section 25."

The Paper Currency Act now in force is Act X of 1923, section 25 of which provides :—

"No person in British India shall draw, accept, make or issue any bill of exchange, *hundi*, promissory note or engagement for the payment of money payable to bearer on demand, or borrow, owe or take up any sum or sums money on the bills, *hundis* or notes payable to bearer on demand, of any such person."

Section 26 of the Act provides that the making of an instrument in contravention of the provisions of section 25 of the Paper Currency Act is an offence and a penalty has been imposed for the transgression.

The objective of the Act is to secure for the Crown a monopoly for the issue and circulation of currency notes which are in form of promissory notes payable to bearer on demand. The only exception engrafted is contained in the proviso, which is for the benefit of persons named therein, and the plaintiff in the present action cannot take shelter under the proviso.

The general provisions of the Negotiable Instruments Act cannot be treated as an indication of an intention on the part of the legislature to legalize an instrument upon which an interdict has been placed by the intervention of a special statute. Again, section 120 of the Negotiable Instruments Act cannot be construed to

include the payee of the negotiable instrument payable to bearer under the head of "a holder in due course."

The promissory note clearly contravenes the provision of section 25 of Act X of 1923.

Under section 23 of the Indian Contract Act "every agreement of which the object or consideration is unlawful is void". The promissory note being the consideration or the object of an agreement to the lender and being clearly forbidden by law, I would hold that it offends against the provision of section 23 of the Indian Contract Act. I would further hold that the promissory note, being forbidden by law, cannot form the basis of a suit.

Sen, J.

It is outside the scope of the present reference to determine whether the plaintiff can maintain a claim against the debtor founded upon an obligation independent of the promissory note.

The admissibility of a document and its enforceability are distinct matters and need not stand or fall together. In the absence of a clear statutory bar against its admissibility as has been provided for in special matters by section 49 of the Indian Registration Act or section 35 of the Indian Stamp Act, the document must be held to be admissible in evidence for whatever it may be worth. Section 91 of the Indian Evidence Act does not impose any bar, because an agreement which is not enforceable in law, as the promissory note in the present instance is, cannot be covered by the word "contract". Moreover, the document itself is the primary evidence of its contents.

It is outside the scope of this reference to determine what is the evidentiary value of this document. It would be unwise to attempt to fetter the judgement of the court below by laying down any adventitious or artificial canons regulating or affecting its weight, scope or credibility. I do not therefore consider it necessary to determine

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whether the instrument can, by itself and without any corroboration, justify a decree in plaintiff's favour. Equally it is undesirable to deal with the questions whether the promissory note should be treated as an acknowledgment of liability, as evidence of an implied promise to pay or as supporting an independent obligation.

BY THE COURT :—The order of the Court is that the following answers be returned to the learned Munsif :—

(1) The promissory note in question is in a form forbidden by law.

(2) The promissory note in question cannot form the basis of a suit.

(3) The plaintiff can sue on the basis of any obligation, whether antecedent to or arising simultaneously with the execution of the promissory note, independently of the execution of the promissory note.

(4) Where there is other evidence outside the promissory note of the obligation sued upon, the promissory note in question is admissible as evidence to be read in conjunction with that other evidence to arrive at a decision as to whether the independent obligation is proved. Where there is no other evidence, while the promissory note is still admissible in evidence there can be no decree on the basis of it alone.

REVISIONAL CRIMINAL.

Before Mr. Justice Dalal.

EMPEROR *v.* RAM CHAND.*

1928
April, 27.

Act (Local) No. VI of 1912 *(United Provinces Prevention of Adulteration Act), sections* 4, 12 *and* 15*—Sale of adulterated ghee—Prosecution duly sanctioned, but complaint not lodged within time—Jurisdiction.*

Held on a construction of sections 12 and 15 of the United Provinces Prevention of Adulteration Act, 1912, that a conviction under section 4 was not invalidated by reason of the complaint not having been preferred within the time limited, although, had the accused refused to attend in answer to the summons issued against him, he could not have been prosecuted under section 174 of the Indian Penal Code.

THE facts of this case sufficiently appear from the judgement of the Court.

Dr. *N. C. Vaish*, for the applicant.

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

DALAL J. :—The applicant Ram Chand has been convicted under section 4 of the United Provinces Prevention of Adulteration Act (VI of 1912) for selling adulterated *ghee*. His prosecution was duly sanctioned as required by section 12 of the Act, but a complaint was not lodged till more than thirty days after the sanction by the Health Officer. The argument here was that the trial court had no jurisdiction to proceed with the prosecution. Section 15 lays down that no summons shall issue for the attendance of any person accused of an offence under section 4, unless the same is applied for within thirty days from the date upon which the order of consent referred to in section 12 shall have been

*Criminal Revision No. 95 of 1928, from an order of W. C. Dibble, District Magistrate of Muttra, dated the 6th of January, 1928.

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made or given. In my opinion this section does not deal with the jurisdiction of the court. Jurisdiction arises under section 12 on the order or consent in writing of the Health Officer. If the applicant had disobeyed the summons, he could not have been prosecuted under section 174 of the Indian Penal Code. When, however, he appeared and stood his trial, section 15 is not so worded as to deprive the court of jurisdiction. It only prohibits the issue of summons, but not the taking place of a trial.

It was further argued that the fine of Rs. 100 was excessive. I do not think so, having regard to the frequency of this kind of offence. I dismiss this application.

Before Mr. Justice Dalal.

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May, 1.

EMPEROR *v.* CHIRANJI LAL.*

Criminal Procedure Code, section 108—*Act No. XLV of* 1860 *(Indian Penal Code), section* 153A—*Proof of one solitary act alone not sufficient for section* 108.

A person who is found on one occasion only circulating notices which may have the effect of promoting enmity between classes may possibly be prosecuted under section 153A of the Indian Penal Code, but he cannot be proceeded against under section 108 of the Code of Criminal Procedure.

THE facts of this case sufficiently appear from the judgement of the Court.

Mr. *Shambhu Nath Seth*, for the applicant.

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

DALAL, J. :—In my opinion Chiranji Lal was wrongly proceeded against under section 108 of the Code of Criminal Procedure, when he ought to have been

*Criminal Revision No. 281 of 1928, from an order of P. C. Plowden, Sessions Judge of Bareilly, dated the 30th of November, 1927.

prosecuted under section 153A of the Indian Penal Code. The facts found by the subordinate courts are that on one and only one occasion Chiranji Lal, who is Assistant Secretary of the Arya Samaj at Bareilly, gave out to a peon of the society certain notices to be affixed publicly in the city of Bareilly, the contents of those notices being such as to promote feelings of enmity or hatred between Muhammadans and Arya Samajists. Part IV of the Criminal Procedure Code is headed "Prevention of offences." It does not provide for punishment of offences already committed. That part of the Criminal Procedure Code deals with steps to be taken to prevent offences in future. The judgement of neither subordinate court gives any indication of Chiranji Lal having ever before disseminated such literature, or of any fear that he would do so in future unless bound over and prevented. It is obvious to me that proceedings were taken under section 108 of the Criminal Procedure Code to avoid the trouble and possible refusal of Government to prosecute under the provisions of section 153A of the Indian Penal Code. When the law has provided certain sanctions, it cannot be permitted that the same action may be taken without sanction by adopting a different course. Chiranji Lal at once admitted that he had given out the notices for public circulation and pleaded that he had not read them before giving them out. This is not the spirit of a man prepared to do an undesirable act at any cost. To take proceedings under section 108 of the Criminal Procedure Code there ought to be evidence that, if not prevented, the person accused would continue to act in the way in which he had done. The words of the section are "disseminates, or attempts to disseminate", and do not cover only one act, in which case the words would have been "has disseminated or has attempted to disseminate." Both the courts deal with one particular offence as if they were trying a

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charge under section 153A of the Indian Penal Code, without inquiring into the reason why the applicant should be bound over. If the analogy of the action taken in this case were applied to other sections of chapter VIII, evidence of the commission of one theft would be sufficient to bind a man over under section 110 of the Criminal Procedure Code, and one beating given by one man to another would be sufficient to bind him over under section 107 of the Criminal Procedure Code. When substantive offences are committed the law does not provide for an easy way of dealing with them under chapter VIII of the Criminal Procedure Code. In the present case if Chiranji Lal, in spite of some of his notices being confiscated, had continued in other ways to give out other notices for publication, this would certainly have been a case to be dealt with under section 108 of the Criminal Procedure Code. In the present case what has been proved against him is the commission of *one* particular offence at one particular time under section 153A, and there is no evidence whatsoever of his having done so before, or of his having an intention of doing so in the immediate future. In my opinion the proceedings under section 108 of the Criminal Proceedure Code were not legally justified. I set aside the order of the Magistrate, dated the 20th of October, 1927, and discharge the applicant.

APPELLATE CIVIL.

Before Mr. Justice Sulaiman, Acting Chief Justice, and Mr. Justice Weir.

MUHAMMAD ZAFARYAB KHAN (DEFENDANT) *v.* ABDUL RAZZAQ KHAN AND OTHERS (PLAINTIFFS).* 1928 *May*, 15.

Civil Procedure Code, section 2(11); *order XXII, rule* 5—*Abatement of appeal—"Legal representative"—Effect of order bringing a person on to the record as legal representative of a deceased appellant.*

When, by an order which has become final, a certain person's name has been brought on to the record of an appeal as the legal representative of the deceased appellant, it is not open to the respondent to urge that the appeal has abated because some other heirs have been left out.

THE facts, material for the purpose of this report, appear from the judgement of the Court.

Maulvi *Iqbal Ahmad* and *Muhammad Abdul Aziz*, for the appellant.

Munshi *Girdhari Lal Agarwala* and Munshi *Shiam Krishna Dar*, for the respondents.

SULAIMAN, A. C. J. and WEIR, J. :—[After stating the facts giving rise to the suit]. A preliminary objection is taken on behalf of the respondents that the appeal has abated. What happened was that during the pendency of the appeal Muhammad Zafaryab Khan, the defendant appellant, died, and an application was made on behalf of his second wife, Musammat Zubeda Begam, alleging that she was the only heir of the deceased defendant. Notice was issued to the plaintiffs respondents, but they did not appear. An order was passed *ex parte*, bringing Musammat Zubeda Begam on the record as the legal representative of Muhammad Zafaryab

*First Appeal No. 283 of 1925, from a decree of Ganga Prasad Verma, Subordinate Judge of Bulandshahr; dated the 16th of May, 1925.

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Khan. Subsequently the respondents applied to this Court for a declaration that the appeal had abated on the ground that some of the heirs of Muhammad Zafaryab Khan had not been brought on the record in time. This application was referred to a Bench of two Judges, who held that the *ex parte* order could not be re-opened and that Musammat Zubeda Begam must be treated as the legal representative of the deceased. As the property in dispute in this case consisted mainly of occupancy holdings it might have been thought that under section 22 of the Agra Tenancy Act the widow was the only heir to this property. However, the order of the Bench holding that the matter cannot be re-opened is now final.

We might also point out that under section 2 of the Code of Civil Procedure "legal representative" does not necessarily mean all the heirs under the personal law, but means some person who in law represents the estate of a deceased person and includes any person who intermeddles with the estate of the deceased. Order XXII, rule 5, requires that when the question of the claimant being the legal representative of a deceased party arises the court shall determine that question. The provisions in rules 3 and 4 show that after the court has determined that a particular person is the legal representative, it shall proceed with the suit. It is, therefore, quite obvious that for the purposes of this appeal it must be taken that Musammat Zubeda Begam is the legal representative of the deceased appellant, and, therefore, it is not now open to the respondents to urge that the appeal has abated, because some other heirs have been left out.

[The rest of the judgement is not material for the purpose of this report.]

Appeal dismissed.

REVISIONAL CIVIL.

Before Mr. Justice Dalal.

SATTAR AND OTHERS (DEFENDANTS) *v.* NAZIR KHAN (PLAINTIFF) AND ASIR AND OTHERS (DEFENDANTS).* 1928 *May*, 16.

Civil Procedure Code, sections 151 *and* 152—*Execution of decree—Correction of accidental slip in judgement and decree—Abuse of the process of the court.*

In a suit for partition of immovable property a certain portion of the property involved, belonging to one set of defendants, was decreed to the plaintiff and the portion belonging to another set of defendants was exempted, and the amin of the court was ordered to draw up a map showing what portion of the property had been decreed to the plaintiff. The map, however, showed as having been decreed to the plaintiff the portion which belonged to the exempted defendants, and in consequence of this the plaintiff obtained possession of the property which had not been decreed to him. The exempted defendants applied for correction of the record, which was refused on the ground that the decree was not at variance with the judgement.

In revision the High Court ordered a fresh and correct map to be prepared, and returned the case to the lower court with directions that the revised map should be substituted for that existing on the record.

THE facts of this case sufficiently appear from the judgement of the Court.

Mr. *B. Malik*, for the applicant.

Mr. *Zahur Ahmad*, Mr. *A. M. Khwaja* and Maulvi *Majid Ali*, for the opposite parties.

DALAL, J. :—A final judgement for the preparation of a final decree was passed in this suit on the 26th of November, 1924. According to the judgement, and also

*Civil Revision No. 247 of 1927.

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according to the decree, certain defendants, who are applicants here, were exempted, and the decree was passed only against defendants Nos. 1 to 10, 13, 27, 28, 29 and 30. The plaintiff was decreed possession against these defendants only, and his suit against the other defendants was dismissed. It is not necessary to dwell on the reasons for the dismissal. To find out over what property the plaintiff should be given possession the court ordered the Amin on the 8th of November, 1924, to prepare a plan of the portion of the house over which the plaintiff was to receive possession. The Amin prepared a plan containing the property in possession of the defendants applicants who were specially exempted from the operation of the decree. Parties and pleaders were negligent as usual, and no one discovered the mistake. Negligence went so far that when the plaintiff Nazir Khan applied some years later for the correction of the decree when he discovered that wrong property was decreed to him, the defendants applicants themselves objected, suspecting a pit was dug somehow for them to fall into. When Nazir Khan executed the decree, and the defendants applicants found that it was over their property that Nazir Khan had obtained possession, they came rushing to court to get the decree amended. The learned Judge of the court denied jurisdiction under sections 151 and 152 of the Code of Civil Procedure, saying that the matter did not relate to correction of a decree. It is true so far that the judgement will also have to be corrected. Section 152, however, applies both to judgements and decrees. The court is given power to correct the errors arising from any accidental slip or omission. In my opinion there was a clear accidental slip in including in the judgement somebody else's property instead of the property of the defendants against whom the decree was passed. The map will have to be revised, but there is no reason why that

should not be done by the court in the present proceedings. Section 151 declares, what was always law, that a court can make any such order that may be necessary to prevent abuse of the process of the court. A more glaring case of the abuse of the process of the court cannot be imagined than the one here, where the process of the court was employed in doing something which the court never intended to do. The decree has already been executed, and possibly in these proceedings the defendants applicants may not be able to obtain restoration of possession. At the same time, so long as the judgement and decree stand, the defendants applicants could not sue for the possession of property wrongly obtained by the plaintiff from them by process of law. I direct that the matter be re-opened and the map mentioned in the court's order of the 26th of November, 1924, in the order-sheet be corrected. I am told that defendants Nos. 1 to 10, 13, 27, 28, 29 and 30 are already parties to these proceedings. In that case the trial court will be able to proceed to the correction of the map so as to bring it in accord with the intention of the court. When the map is corrected, that map shall be substituted for the map existing on the decree at present.

As it was due to the stupidity of the defendants applicants that this litigation arose and the plaintiff had behaved quite honestly in trying to get the decree amended, I direct that costs here of the plaintiff shall be paid by the defendants applicants. The order of the trial court dated the 6th of August, 1927, is hereby set aside and that court is directed to proceed according to the instructions given above.

Application allowed.

Before Mr. Justice Dalal.

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May, 16.

RADHA KISHAN (DEFENDANT) *v.* BHORE LAL AND ANOTHER (PLAINTIFFS).*

Act No. IX of 1872 (*Indian Contract Act*), *section* 11—*Act No. I of* 1872 (*Indian Evidence Act*), *section* 115—*Contract entered into with an infant representing himself to be of full age—Estoppel—Equitable relief.*

Where a suit is brought upon a contract entered into with an infant on the strength of a representation made by the infant that he is of full age, the defendant will not be estopped from pleading his minority; but, *semble*, upon equitable grounds he might be made liable for any loss which the plaintiff might have suffered in carrying out the contract entered into with him.

THE facts of this case sufficiently appear from the judgement of the Court.

Munshi *Panna Lal*, for the applicant.

Munshi *Sarkar Bahadar Johari*, for the opposite parties.

DALAL, J. :—To the plaintiffs' suit for recovery of money due on a contract the reply was that the defendant Radha Kishan was a minor on the date of the contract. According to a guardianship certificate given by a District Court to his mother the date of birth of Radha Kishan is the 14th of August, 1907. The present contract was effected on the 16th of January, 1926, i.e., before Radha Kishan reached the age of 21. He was, therefore, a minor on the date of the contract. The learned Judge of the lower court, however, held him liable under the contract on this ground :—"When a person between 18 and 21 years of age enters into a contract, with the knowledge that his minority has been extended by reason of an order under section 7 of the Guardians and Wards Act, with a person who is not

*Civil Revision No. 90 of 1928.

aware of that fact, there is misrepresentation and legal fraud on his part and he is estopped from taking advantage of his minority to show that the contract by him is inoperative". Obviously, though he makes no such reference, the Judge is referring to the provisions of section 115 of the Evidence Act. He, however, quotes no authority for his proposition. In Woodroffe and Ameer Ali's Evidence Act (1915) the question is discussed at page 765, and they sum up the result of decisions as follows :—

"A person under disability cannot do by an act *in pais* what he cannot do by deed. He cannot by his own act enlarge his legal capacity to contract or to convey. He cannot be made liable upon a contract by means of an estoppel under this section, if it be elsewhere declared that he shall not be liable upon a contract. To say that by acts *in pais* that could be done in effect which could not be done by deed would be practically to dispense with all the limitations the law has imposed on the capacity to contract. So if a person sues an infant upon a contract, such contract having been entered into on the faith of a representation by the infant that he was of full age, the infant will not be estopped from pleading his minority in answer to a claim to fix him with personal liability to a money decree, notwithstanding his fraudulent representation. But though this section may not apply, the court may, in other cases acting on well-recognized principles of equity, relieve against an infant's fraud".

So in a case like the present the plaintiffs cannot prevent the defendant from pleading minority on the ground of estoppel. At the same time the defendant would be liable for any loss the plaintiffs may have suffered in carrying out the contract and arrangement entered into between the parties. In the present case the plaintiffs fixed the price of the 101 bags according to the

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contract at Rs. 2,653, including interest and miscellaneous costs, and stated that they had received Rs. 2,346. It does not appear that under the contract they suffered any damage or were out of pocket to any extent. They have not disclosed for what price they themselves purchased the 101 bags. In a case like the present I think that on the grounds of equity the plaintiffs could have recovered from the defendant any sum they could have proved to have been lost by them in making the purchase at the cost price to them and in selling. From the figures quoted above I come to the conclusion that they have suffered no such damage. No ground of equity, therefore, arises, and the defendant cannot be estopped from pleading minority.

Another ground for the application was that the suit was not of a nature cognizable by a Court of Small Causes. I do not agree. This is not a suit for an account. In every suit for money some account has to be prepared. In the present case there was only one transaction and the claim is for a specific sum of money as the result of the purchase and sale of goods under one agreement. This is not a case where money may have been advanced to a party from time to time, or purchases made from him from time to time according to some arrangement entered into between the parties. The suit was rightly entertained by the lower court.

In the result I set aside the decree of the lower court and dismiss the plaintiffs' suit; but without any order as to costs.

MISCELLANEOUS CIVIL.

Before Mr. Justice Sulaiman, Acting Chief Justice.

BAIJNATH (APPLICANT) *v.* DULARI HAJJAM (OPPOSITE PARTY).* 1928 *May*, 17.

Letters Patent, section 10—*Amendment of—Rules framed in consequence of amendment—Appeal—Limitation—Extension of time.*

A rule of limitation is a rule of procedure and, unless something special in it justifies a contrary inference, governs all proceedings from the moment of its enactment, even though the cause of action may have accrued before the rule came into existence. *Soni Ram* v. *Kanhaiya Lal* (1), referred to.

THE facts of this case sufficiently appear from the judgement of the Court.

Pandit *Vishwa Mitra*, for the applicant.

SULAIMAN, A. C. J. :—This is an application for leave to appeal under the Letters Patent and for extension of time.

Had the judgement been delivered before the amendment of section 10 of the Letters Patent came into force, no leave would have been necessary and a substantive right of appeal could not be taken away by a subsequent amendment of the Letters Patent. The amendment came into force from the date of its publication in the Gazette, namely the 28th of January, 1928. The judgement in the present case was delivered after this date, hence leave is necessary.

As regards the prayer for extension of time, it is quite clear that section 5 of the Limitation Act does not apply to this case, for the period is fixed not under the

*Application in Second Appeal No. 200 of 1928, for leave to appeal under the Letters Patent and for extension of time.

(1) (1913) I.L.R., 35 All., 227.

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Limitation Act, but by special rules framed by this Court. Under chapter 3, rule 6, of the old rules there was power to extend the time for good cause shown. Under the new rule 6A there is no power to extend the time if 60 days have expired.

The question is whether the old rule or the new rule applies. The new rule, though made earlier, was published in the Gazette of the 3rd of March, 1928. Under section 131 of the Code of Civil Procedure rules made by the High Court have the force of law from the date of publication, or from such other date as may be specified. In the present case no date was specially specified. The present appeal was filed after the new rule came into force. It seems to me that, although the right of appeal is a substantive right, no one has a vested right in a period of limitation. It cannot be said that there is any substantive right in an appellant to wait for a particular period of time before filing the appeal. Rules of limitation are *primâ facie* rules of procedure, and unless there is something special in the rules which justified a contrary inference, the rules applicable to an application or appeal would be rules which are in force at the time when the appeal or the application is filed. It has been held in numerous cases that a Statute of limitation is retrospective in its operation and governs all proceedings from the moment of its enactment, even though the cause of action might have accrued before the Act came into existence: *Soni Ram* v. *Kanhaiya Lal* (1).

Although this was a case in which I might have granted leave if I had the power to extend the period, I reject the application because it is admittedly beyond time.

(1) (1913) I.L.R., 35 All., 227.

Before Mr Justice Mukerji.

IN THE MATTER OF DEHRA DUN MUSSOORIE ELECTRIC TRAMWAY COMPANY, LIMITED (IN LIQUIDATION).* 1928 *May*, 21.

Act No. VII of 1913 (*Indian Companies Act*), *sections* 152, 179 *and* 234—*Company—Winding up—Official liquidator—Power to refer to arbitration—Civil Procedure Code, schedule II.*

An official liquidator has no power to refer to arbitration under the second schedule to the Code of Civil Procedure any matter in dispute in which the company that he represents is interested.

THE facts of this case sufficiently appear from the judgement of the Court.

Sir *Tej Bahadur Sapru* and Pandit *Ladli Prasad Zutshi*, for the Allahabad Bank, Limited.

Munshi *Narain Prasad Ashthana*, (official liquidator), for the company.

MUKERJI, J. :—This is an application, filed on the 18th of May, 1928, in chambers, by one of the official liquidators, Mr. *Ashthana*, for Dehra Dun Mussoorie Electric Tramway Co., Limited (in liquidation), Mr. *Ladli Prasad* representing the Allahabad Bank, Limited.

It appears that a few months back the liquidators obtained permission from ASHWORTH, J., to institute a suit against the Allahabad Bank, Limited, for recovery of over two lakhs of rupees on certain grounds. The liquidators and the Allahabad Bank now desire that the difference between them should be settled by a private arbitration of two gentlemen, one nominated by each of the parties and mentioned in the application.

The first question that arises is whether the Companies Act permits such a reference to arbitration by

*Miscellaneous Case No. 96 of 1926.

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official liquidators, even with the sanction of the court. I heard Sir *Tej Bahadur Sapru*, representing the Allahabad Bank, Limited, and Mr. *Ashthana*, one of the official liquidators, in support of the application. Both the learned gentlemen expressed their view and submitted certain arguments that a reference to private arbitration was permissible under section 179, clauses (*a*) and (*i*), of the Indian Companies Act. I deferred passing orders till I had carefully considered the matter, with the help of the arguments advanced before me.

It is to be noticed that section 179, by itself, does not make any mention of reference to arbitration. Clause (*a*) permits the liquidator to institute or defend any suit or prosecution of other legal proceeding, civil or criminal. A reference to private arbitration does not come within any of the expressions used in the clause. The clause (*i*) is in general terms and permits a liquidator to "do all such other acts as may be necessary for winding up the affairs of the company and distributing its assets", with the sanction by the court. This omnibus clause was undoubtedly meant to signify that besides the powers expressly given in clauses (*a*) to (*h*), such other powers as may be necessary for winding up the affairs may be exercised. I do not think that when an express mention of power to institute or defend suits or legal proceedings is made, the general rule may be construed as including a power to refer to private arbitration.

Reference was made to section 152 of the Act, which gives a company power to refer to arbitration. There the rule is limited to a reference under the Indian Arbitration Act. A reference under schedule II of the Code of Civil Procedure is not mentioned there. Then, the powers which a living company may possess may not be co-extensive with the powers to be exercised by the

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liquidators. The directors of the company are supposed to know their own business, being business men, while an official liquidator is very often a new man, unconnected with the business carried on by the company. His knowledge and information of men and things is not likely to be co-extensive with similar knowledge of the directors. It, therefore, does not follow that because a living company is allowed to refer matters in difference to arbitration in a particular way, an official liquidator is allowed to make a reference to private arbitration.

A reference to section 234 of the Indian Companies Act will show that the liquidator, with the sanction of the court, may compromise certain claims against the company and outstandings in favour of the company. It is, therefore, significant that while the Act deals with a power of compromise in the liquidator, it makes no mention of his power to make a reference to arbitration. The reason for this omission may be this. In the case of a compromise the court has the actual terms before it and may be in a position to see whether the terms should be accepted or not. In the case of arbitration by private gentlemen the whole matter is left in the dark, however eminent and learned the arbitrators may be. The arbitration shuts out all controversy for ever and, in the case of even obvious mistakes by arbitrators, no remedy by way of appeal is available. It is true that no official liquidator or the court controlling his actions may foresee what decision a court, to which the official liquidator may resort, will give. But, then, proceeding for redress to the court is a legitimate process which can never be objected to on any principle. In an ordinary case of arbitration, the parties are supposed to know their own minds and, acting as they do in their own interests, are held precluded from questioning the decision, however wrong or inequitable it may be. The liquidator acts not on his own behalf but in the interest of a large

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body of men. It can therefore be easily conceived that the legislature did not think it proper that, even with the sanction of the court, the liquidator may be permitted to choose his own court, in the place of the regularly constituted courts. This may be a solid reason why the Companies Act makes no mention of a power to refer to arbitration, in the case of an official liquidator. The Act does refer to "arbitration" and "compromises", and it is therefore not open to us to suppose that it was a matter of pure omission, through inadvertence, that reference to arbitration was not one of the powers granted to the liquidator.

It has been held that suits instituted under section 92 of the Code of Civil Procedure cannot very well be made the subject-matter of private arbitration. The principle on which this conclusion was arrived at equally applies to a case of this nature.

I asked Sir *Tej Bahadur Sapru* if he could cite any authority, English or Indian, establishing the power of an official liquidator to refer a matter in dispute to private arbitration with the sanction of the court. He frankly admitted that he did not come across any such authority. He also assured me that he did not come across any authority which might go against the existence of such power. But only an affirmative authority can be of any use in the present instance; and not the absence of authority to the contrary. In the course of my study I came across the case of *Van Den Hurk* v. *R. Martens & Co.* (1). In this case the controversy was about costs and whether costs should be paid by the liquidator in person or whether it should come out of the assets. There is some reference in this judgement to arbitration, but it is not clear whether the arbitration was after the company went into liquidation or whether an arbitration was pending when the company went into liquidation. There

(1) (1920) 1 K.B., 850.

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is no discussion in the case as to a liquidator's power to refer to private arbitration. I do not, therefore, find this case to be of any guidance to me.

Looking from all points of view it appears to me that I should not permit the official liquidators to refer the present dispute to private arbitration. I accordingly refuse the application.

I may point out that, in any case, the present application could not be granted except to authorize the official liquidators to execute an "agreement of reference to arbitration" jointly with the Allahabad Bank. The present application is framed as if a suit is already pending in this Court and a reference is to be made in the suit, under paragraph 1 of schedule II of the Code of Civil Procedure.

The sanction to institute the suit was given sometime back, and it will be the duty of the official liquidators to institute the suit forthwith. Questions of limitation may arise in the case and the liquidators must bear the responsibility if, owing to delay, any portion of the claim be lost.

REVISIONAL CRIMINAL.

Before Mr. Justice Dalal.

MUNNA TIWARI AND OTHERS *v.* CHANDRABALI AND OTHERS.*

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May, 21.

Criminal Procedure Code, sections 137 *and* 139*A—Public nuisance—Distinction between public right and private right* —Bonâ fide *claim to the exercise of a private right—Procedure.*

Where in the course of proceedings initiated under chapter X of the Code of Criminal Procedure it becomes apparent that

*Criminal Revision No. 275 of 1928, from an order of Kashi Prasad, Additional Sessions Judge of Basti, dated the 3rd of March, 1928.

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there is a *bonâ fide* question of the private rights of the parties involved, the proper course for the court to adopt is to stay the proceedings until such time as rights of the parties concerned have been decided by a competent civil court. *Emperor* v. *Bharosa Pathak* (1), In re *Maharana Shri Jaswantsangji Tatesangji* (2), *Jagarnath Sahu* v. *Parmeshwar Narain* (3), *Abdul Wahid Khan* v. *Abdullah Khan* (4), *Bhagwan Das* v. *Emperor* (5) and *Manipur Dey* v. *Bidhu Bhushan Sarkar* (6), referred to.

THE facts of this case sufficiently appear from the judgement of the Court.

Mr. *Syed Muhammad Husain*, for the applicants.

Maulvi *Iqbal Ahmad*, for the opposite parties.

DALAL, J. :—This is an application for revision from an order passed by a Magistrate in the Basti district under section 137 of the Code of Criminal Procedure directing that a certain *bandh* (a wall to prevent the flow of water) be removed. The court adopted the correct procedure by issuing a notice against the applicants to remove the *bandh* within a certain time specified in the order, or to appear and show cause against the same. When the applicants appeared, they denied the existence of any public right in the opposite party under section 139A. The Magistrate thereupon recorded evidence. There was considerable reliable evidence in support of the denial of the right being a public right. The Magistrate, however, found that there was no such evidence and proceeded as laid down in section 137 of the Code of Criminal Procedure. The applicants Munna Tiwari and others have, therefore, come in revision to this Court, because the Magistrate finally made the orders under section 133 absolute under section 137 of the Code of Criminal Procedure.

For the sake of convenience the persons who desired the removal of the *bandh* may be called

(1) (1912) I.L.R., 34 All., 345.
(2) (1897) I.L.R., 22 Bom., 988.
(3) (1914) I.L.R., 36 All., 209.
(4) (1923) I.L.R., 45 All., 657.
(5) (1922) 73 Indian Cases, 523.
(6) (1914) I.L.R., 42 Calc., 153.

Chandrabali's party, and the persons who built the *bandh* may be called Munna's party. There is a very large *jhil* (expanse of water) on Chandrabali's side in village Tal Bharanch *alias* Bakhra *jhil*. This village is on a higher level than the village of Ghurapali which belongs to Munna and others. The water flows down from the *jhil* by a channel to the river Rapti from village Tal Bharanch and village Ghurapali which adjoins Tal Bharanch. Subsequently the water passes through several villages before it reaches the river Rapti. During the rains there is an expanse of water right up from the *jhil* to the Rapti, but in the dry season the water has to be prevented from flowing away, and Chandrabali's party have by litigation acquired a right to build a *bandh* to preserve the water of the *jhil* during the dry season. Munna's party of the Ghurapali village did the same during the spring and collected water for their use in their village. In the winter and spring this year there had been rain, so this stoppage of water threw the water back on to the village of Chandrabali, and it is alleged that it caused damage there. Chandrabali's party claimed that Munna had no right to build the *bandh* which he did to stop the water flowing on to the river Rapti, and that Chandrabali and his party have a right to prevent all the villages between their village and the Rapti from building a *bandh* and thereby preventing the flow of water from Chandrabali's *jhil* to the Rapti, when Chandrabali has surplus water. This very statement of the case will show that Chandrabali claimed a private right, and not a public one. Both the subordinate courts have relied on a single Judge case of this Court, *Emperor* v. *Bharosa Pathak* (1), in holding that the right claimed by Chandrabali was a public right, because it affected a very large number of

(1) (1912) I.L.R., 34 All., 345.

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people. In that case, however, the learned Judge observed that the case was on the border line. He made reference to section 268 of the Indian Penal Code, in which a public nuisance is defined as an act or an illegal omission which causes any common injury, danger or nuisance to the public, or to the people in general who dwell or occupy property in the vicinity. The injury must be to the people in general, and not to particular people, such as cultivators. In the present case the injury is not caused to people in general, whether they be cultivators or artisans, but only to a certain class of people who are agriculturists in the village of Chandrabali. As pointed out by a Bench of two Judges of the Bombay High Court in *In re Maharana Shri Jaswatsangji Fatesangji* (1), not only the way, river or channel, where an unlawful obstruction is made, must be one of public use, but also the obstruction must be of that public use. In the present case the channel is not a public river, but one passing through particular villages, and of which the water is used by the agriculturists on both banks thereof. The obstruction in any way cannot be considered public, because only the villagers of Chandrabali's village allege that they were injured thereby, and there is no complaint by the general public. In a case similar to the present a Bench of this Court considered the law on the subject in some detail, and came to the conclusion that a field which is on a lower level than the adjoining fields and over which the surplus water of these adjoining fields used to flow into a tank, even if it be described as a channel, is not such a channel as had been or could lawfully be used by the public, and action cannot be taken under section 133 of the Code of Criminal Procedure for the removal of any unlawful obstruction from it: *Jagarnath Sahu* v. *Parmeshwar Narain* (2). In a Full Bench ruling, *Abdul*

(1) (1897) I.L.R., 22 Bom., 988. (2) (1914) I.L.R., 36 All., 209.
(3) (1923) I.L.R., 45 All., 657.

Wahid Khan v. *Abdullah Khan* (3), the majority of Judges out of three were of opinion that the Magistrate has jurisdiction to take action under section 133 of the Code of Criminal Procedure even where a *bonâ fide* claim of right is raised by the defendent, but when the question whether the right rested in the public is seriously disputed, and its decision becomes a difficult matter of mixed fact and law, the proper procedure for a Magistrate to employ would be under section 139A(2) to stay proceedings until the matter of the existence of such right has been decided by a competent civil court. In a case before me in Oudh I drew the attention of Magistrates to the observations of Mr. Justice DANIELS in another case that the existence of a genuine dispute as to title, suitable for decision by the civil court, is a sufficient ground for not making an order absolute under section 137 of the Code of Criminal Procedure: *Bhagwan Das* v. *Emperor* (1).

It may be noticed that the provisions of section 139A were enacted in 1923 to give effect to a Bench ruling of the Calcutta High Court in *Manipur Dey* v. *Bidhu Bhushan Sarkar* (2). That case was a case of the obstruction of a public way, and the decision was that if the Magistrate finds that the claim of the defendant is a *bonâ fide* one to the effect that the right is private and not a public one, the Magistrate should stay his hand and refer the parties to the civil court. In the present case there cannot be the slightest doubt that Munna's party is laying a *bonâ fide* claim to a private right to raise a *bandh* for the preservation of water to irrigate their own fields. In fact Mr. *Iqbal Ahmad*, who appeared for the opposite party, informed the Court that a suit for damages to the extent of Rs. 50,000 was being prepared for the damage caused to Chandrabali's party by the *bandh* being put up. Obviously, then, the dispute is a private one between Munna's party and Chandrabali's party, and

(1) (1922) 73 Indian Cases, 523. (2) (1914) I.L.R., 42 Calc., 158.

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should be decided by a civil court. As pointed out in the Calcutta case and in the case of this Court reported in I.L.R., 45 Allahabad, the proper order for the Magistrate to pass was one under section 139A to stay proceedings until the matter of the existence of such right had been decided by a competent civil court. I set aside the order of Mr. Ram Bihari Sahi, Magistrate, dated the 19th of February, 1928, under section 137 of the Code of Criminal Procedure and substitute in its place an order under section 139A that the proceedings be stayed until the matter of the existence of the right of Munna's party to build the *bandh* has been decided by a competent civil court.

Before Mr. Justice Dalal.

1928
May, 22

EMPEROR *v.* HASAN AHMAD.*

Act No. VIII of 1914 (Indian Motor Vehicles Act), sections 6, 8, 9 and 16—United Provinces Motor Vehicles Rules, 1924, rules 20, 21, 22 and 24—Licence—Permit—Failure to produce permit—Power of district authority to prescribe route along which a public motor vehicle shall ply for hire.

Held, (1) that there is no power given to the "district authority" either by the Indian Motor Vehicles Act, 1914, or by the rules framed thereunder, which enables that authority to prescribe the route along which a public motor vehicle authorized to ply for hire shall run, and (2) that there is no provision in either the Act or the rules which renders punishable the non-production of a "permit" issued under rule 24, as distinct from a licence prescribed by section 6 and rules 20—22.

This was a reference made by the District Magistrate of Muttra. The facts of the case are clearly stated in the referring order, which was as follows :—

"In my opinion the convictions and sentences passed in this case cannot possibly be upheld. The Magistrate has

*Criminal Reference No. 416 of 1928.

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convicted the applicant on what he styles as two different charges under section 16 of the Indian Motor Vehicles Act, 1914. One charge appears in the judgement to be failure to produce his licence upon demand by a police constable, contrary to section 8, and the second charge appears to be driving a motor vehicle in an area for which his licence was not available, contrary to the provisions of section 9.

But when I come to examine the record in order to ascertain exactly with what offences and under what sections the applicant was charged in the trial of the case, I find that he was charged with quite different offences. The summons issued to him under section 16 of the Motor Vehicles Act was defective, since it omitted to specify the sections of the Act, or rules made thereunder, for breach of which the applicant was being prosecuted. The seriousness of this defect has been recently stressed by the Hon'ble High Court in *Emperor* v. *Kunwar Rananjai Singh* (1). When the applicant appeared in court, he was tried summarily. The record shows that the police report, Exhibit 1, was read over to him as containing the offence for which he was charged, and that he pleaded not guilty. The document, Exhibit 1, is the police charge-sheet, and the offences committed by the applicant are set out therein as follows :—

"*Mulzim Khana No.* 7 *apni motor lorry No.* 13 *sarak Sadabad janib Baldeo sawariya bithlaye hue Muthra ko ja raha tha. Ijazat-nama chalane sarak Sadabad talab kiya gaya, to nam-burda ne kaha ki hamare pas nahin hai.. Chunki yeh fail namburda ka dafa* 16 *Act Motor ki had tak pahunchta hai, lehaza naksha charge-sheet murattab karke bagarz qaimi jurm ijlas janab Hakim pargana Sahib Sadabad irsal hai. Is shakhs ne is sarak par motor chalane ki ijazat hasil nahin ki hai, khilaf sharait licence jurm kiya hai.*"

Now from this police report it is clear that the police took the view that the applicant was not entitled to drive his motor vehicle on the Muttra-Sadabad road, without some form of special permit. They were prosecuting him for driving on this route without a permit, or in the alternative for failure to produce his permit, if any such permit existed.

(1) (1928) 26 A. L. J., 331.

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But the sections of the Act under which the Magistrate has convicted the applicant do not refer to any special permit for driving a motor vehicle along any particular route. The licence to which they refer is the licence to drive a motor vehicle, which is made compulsory by section 6 of the Motor Vehicles Act, and shown in the form given in schedule "B" of the United Provinces Motor Vehicles Rules, 1924. This licence is given in accordance with rules Nos. 20-22 of these motor vehicles rules, but these rules do not authorize the licensing authority to specify the routes over which a driver of a motor vehicle may drive. As a matter of fact these driving licences are issued for the whole of the United Provinces.

The judgement of the Magistrate shows that during the trial he never directed either his mind or the evidence to the question whether the applicant was asked to produce his driving licence in the form given in schedule "B", as he could be required to do under rule 21 and also under section 8 of the Act, and whether he refused to produce his licence. He directed himself entirely to a consideration whether any form of permit has been issued to the applicant to drive a public motor vehicle on the route from Muttra to Sadabad, and whether the applicant had refused to produce this permit. Accordingly in his defence on these charges, for which he was placed on his trial, the applicant produced a form of permit which has been exhibited and marked Exhibit "2".

Now it is contended in support of the convictions that under the Motor Vehicles Rules, 1924, there was an authority constituted, called the District Authority, by rule 24 of the rules and that this authority had the right to issue permit for public motor vehicles to ply along certain specified routes, and that without such a permit no public motor vehicle could ply for hire and that it could only ply along the routes specified in the permit. It is also argued that the route specified in the permit granted to the applicant gave no right to ply on the route from Muttra to Sadabad, and he has therefore been rightly convicted.

Now I have already pointed out that the sections under which the Magistrate has convicted the applicant do not apply to permits at all. They do not apply to any permit issued

under rule 24, but to the driving licence prescribed by section 6 of the Act and rules 20 to 22. Consequently, on this account only, the convictions must be set aside.

But furthermore, there is nothing in the rules to make it compulsory for the driver of a public motor vehicle to produce on demand the permit issued to him under rule 24, and consequently the applicant committed no offence by failing to produce his permit, Exhibit 2.

Again I am unable to agree that rule 24 of the rules authorized a District Authority to limit the routes along which a particular public motor vehicle might ply.

Under rule 24(*b*), the authority was authorized to fix the rates for which public motor vehicles should ply.

Under rule 24(*c*) it was authorized to fix the maximum number of persons and the weight of luggage to be carried in a public motor vehicle, and in the case of motor lorries the weight of goods.

Under rule 24 (*d*) it was authorized to fix stands and places at which public motor vehicles might stand to ply for hire, as well as to fix the hours of departure of vehicles for specified places. But this does not mean that the District Authority was authorized to prescribe fixed routes for public motor vehicles and prohibit them from plying along any route other than these. My contention is borne out by the form of permit shown in schedule I attached to the rules. Incidentally, the permit, Exhibit 2, has not been issued strictly in accordance with the form given in schedule I.

The result is that not only do I hold that the applicant has been wrongly convicted under section 16 of the Motor Vehicles Act, 1914, for breach of the conditions imposed under sections 8 and 9, but I also find that he has committed no offence at all under the Motor Vehicles Act or rules.

I, therefore, direct that the record be submitted to the Hon'ble High Court, with the recommendation that the convictions, sentences and order for cancellation of the licence be set aside. The Magistrate should submit any explanation which he has to offer within seven days. Furthermore, under section 438 of the Criminal Procedure Code I suspend execution of the order for cancellation of the license."

The parties were not represented.

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DALAL, J. :—This is a very careful submission by the District Magistrate and may usefully be reported in the Law Journals.

I set aside the conviction and sentence of Hasan Ahmad and direct the fine, if any recovered, to be refunded. All other incidental orders of the trial court are also cancelled.

REVISIONAL CIVIL.

Before Mr. Justice Mukerji and Mr. Justice Banerji.

1928
May, 23.

LAKHPAT RAI (APPLICANT) *v.* DURGA PRASAD AND ANOTHER (OPPOSITE PARTIES).*

Act No. XIV of 1920 *(Charitable and Religious Trusts Act), section 3—Application for particulars relating to a trust —"Person interested in a trust."*

Held that, in regard to a trust the object of which was the maintenance of a public dharamsala in a certain city, a person who was a resident of that city, entitled to say at the dharamsala, and secretary of the local Dharm Asthan Sudhar Committee, was a person interested in the trust within the purview of section 3 of the Charitable and Religious Trusts Act, 1920, and therefore entitled to apply to the District Judge to call up on the manager of the dharamsala to furnish certain particulars as specified in the Act.

THIS was an application for revision of an order passed by the District Judge of Meerut under the provisions of the Charitable and Religious Trusts Act, 1920. The facts of the case sufficiently appear from the judgement of the Court.

Babu *Surendra Nath Gupta*, for the applicant.

Dr. *N. C. Vaish*, for the opposite parties.

MUKERJI and BANERJI, JJ. :—This is an application in revision by one Lakhpat Rai, who was manager

*Civil Revision No. 137 of 1927.

of a dharamsala in Meerut, under a deed executed by Musammat Sundar Kunwar on the 9th of December, 1908.

One Durga Prasad, who described himself as a respectable Hindu citizen of Meerut, a Brahman by caste, and a Secretary of the Dharam Asthan Sudhar Committee, Meerut, presented an application to the District Judge of Meerut praying that the trustees of the trust created by Musammat Sundar Kunwar be directed to furnish the petitioner, through the District Judge, with (1) the particulars as to the details of the trust properties as they existed on the date of the application, (2) the names of persons to whom each property is given on rent, (3) the income derived from the trust and the expenditure incurred; and that the accounts of the trust for the last three years be examined and audited through some certified auditor.

Objection was taken by Lakhpat Rai, among other grounds, on the ground that the petitioner was not a person interested in the trust within the meaning of section 3 of Act XIV of 1920 and, therefore, the order of the learned District Judge was incompetent. Section 3 provides that any person having an interest in any express or constructive trust created or existing for a public purpose of a charitable or religious nature may apply by petition to the court for reliefs for which the present petitioner has applied.

We are of opinion that the words "having an interest in a trust" must in each case depend upon the nature of the trust. Lakhpat Rai was the trustee of a dharamsala constructed and dedicated under the deed of the 9th of December, 1908, and Durga Prasad in our opinion had an interest in that trust inasmuch as he was entitled to stay in that dharamsala and as secretary of the Dharm Asthan Sudhar Committee, Meerut.

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LAKHPAT RAI v. DURGA PRASAD.

We are of opinion that the view taken by the learned District Judge is correct and this application is dismissed with costs to be paid by the applicant personally.

Before Mr. Justice Mukerji and Mr. Justice Banerji.

1928 *May*, 23.

NARSINGH PRASAD SINGH AND OTHERS (DEFENDANTS) *v.* PARTAP SINGH AND OTHERS (PLAINTIFFS).*

Civil Procedure Code, order XXXIV, rule 8—Mortgage by conditional sale—Execution of decree—Power of court to extend time for payment.

The proviso to rule 8 of order XXXIV of the Code of Civil Procedure applies to the whole of the rule and not merely to sub-rule (4). A court, therefore, has power to extend the time for payment in a suit for redemption of a mortgage by conditional sale, just as in the case of any other kind of mortgage.

THE facts of this case sufficiently appear from the judgement of the Court.

Munshi *Kamala Kant Verma*, for the applicants.

Munshi *Gadadhar Prasad*, for the opposite parties.

MUKERJI and BANERJI, JJ. :—This is an application inviting us to revise an order of the 21st of May, 1927, by which the learned Munsif of Benares purported to extend the time, originally limited by a decree for redemption, to pay up.

The suit out of which this application has arisen was one for the redemption of the mortgage, the nature of which we have not been told. The decree, however, that was passed indicates that the mortgage was one by conditional sale, for we find that the decree directed that in case of non-payment of the mortgage money the plaintiffs' right of redemption would be

*Civil Revision No. 150 of 1927.

barred. We have assumed, therefore, that the mortgage was one by conditional sale and that the decree in those terms was rightly passed. The last date on which the payment could be made was the 30th of April, 1927. On the 29th of April, 1927, the plaintiffs came into court with an application for extension of time. The learned Munsif has extended the time by 15 days by the order complained of. In this Court it has been contended that this order was passed without jurisdiction, inasmuch as order XXXIV, rule 8, of the Code of Civil Procedure did not authorize the Munsif to extend time in a case of a decree for redemption of a mortgage by conditional Sale.

The contention of the learned counsel for the applicants is that the proviso to rule 8 is a part of sub-rule (4) alone and does not govern the entire rule 8.

We are of opinion that this contention is not sound. Our opinion is that the proviso governs not only sub-rule (4) but also sub-rule (2). A date for payment has to be fixed in a suit for redemption, in the case of mortgages of all classes. There is, therefore, no reason why the provision for postponement of the date of payment should be read as confined to the case of some classes of mortgages, to the exclusion of others. Sub-rule (2) deals with the case of the redemption of a mortgage by conditional sale. It is in those cases that an extension of time is at all material. In the case of a decree for redemption of a simple mortgage or a usufructuary mortgage, the preliminary decree directs that in case of non-payment of the mortgage money the property shall be sold. The procedure for sale must necessarily be the procedure laid down in order XXI of the Code of Civil Procedure. In the process of the sale, the plaintiff mortgagor takes up the position of a judgement-debtor

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and he would be entitled to pay the mortgage money till the property is sold, and perhaps after the sale within 30 days limited for payment. There would be no sense in refusing to accept his money and yet selling the property, although the sale may not fetch the full value offered by the plaintiff mortgagor.

We are fortified in our opinion by the fact that a proviso similar to the proviso to be found in rule 8 is to be found in the case of a preliminary decree to be passed in the case of a foreclosure suit, in rule 3 of order XXXIV. On the other hand a similar proviso for extending time is not to be found in the case of a preliminary decree in a suit for sale, which is provided for in rule 4 of order XXXIV. In this Court it was held under the Transfer of Property Act, before it was amended by Act V of 1908, that the right of payment of a foreclosure decree remained existent till a final decree was passed. We need not consider whether that rule of law still holds good under the Code of Civil Procedure, but we take it that the legislature was aware of such a view being held by this High Court.

Holding the view we do hold of rule 8 of order XXXIV, we are of opinion that the Munsif was authorized to extend the time.

Mr. *Verma* invited us to consider whether the discretion was properly used by the lower court in extending the time. In revision we are not prepared to interfere with the exercise of a discretion which was undoubtedly vested in the court below.

The application is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Sen and Mr. Justice Niamat-ul'ah.

DHARAM PRAKASH (DEFENDANT) *v.* KALAWATI DEVI (PLAINTIFF).* 1928 *May*, 25.

Hindu law—Adoption—Suit to set aside an adoption—Estoppel—Limitation—Act No. IX of 1908 *(Indian Limitation Act), schedule I, articles* 91 *and* 118—Khandani rishtedar, *interpretation of.*

Held, on a construction of a clause in a will forbidding the adoption by the widow of the testator of a *khandani rishtedar* of her father's family that the son of a daughter of a brother of the widow was not such a *khandani rishtedar* and his adoption was, therefore, not opposed to the conditions laid down in her husband's will. *Radhay Parshad* v. *Nannu* (1) and *Khuman Singh* v. *Hardai* (2), distinguished.

In a suit to have an adoption set aside it is not necessary to sue also to set aside the deed by which the adoption is declared. The deed itself does not confer any status upon the person adopted: it only recites a fact and is evidence of the fact having taken place.

Where an adoption had taken place with great publicity and with due performance of all the necessary ceremonies, and a formal deed of adoption had been executed and registered and the adopted son had been received into the family of his adoptive father, and where, further, the adoption was not challenged for several years, it was *held* that an estoppel was created whereby the adoptive mother was precluded from afterwards disputing the adoption.

Dharam Kunwar v. *Balwant Singh* (3), *Sarat Chunder Day* v. *Gopal Chunder Laha* (4) and *Bloomenthal* v. *Ford* (5), referred to. *Dhanraj Joharmal* v. *Soni Bai* (6) and *Gopee Lall* v. *Mussamat Sree Chundraolee* (7), distinguished.

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*First Appeal No. 386 of 1925, from a decree of S. Ali Muhammad, Subordinate Judge of Meerut, dated the 21st of May, 1925.

(1) (1910) 5 Indian Cases, 669. (2) (1888) I. L. R., 11 All., 41.
(3) (1908) I. L. R., 30 All., 549; (1912) I. L. R., 34 All., 398.
(4) (1892) I. L. R., 20 Calc., 296. (5) (1897) A.C., 156 (168).
(6) (1925) I. L. R., 52 Calc., 482. (7) (1872) L.R., I.A., Sup., Vol., 131.

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THE facts of this case are fully set forth in the judgement of the Court.

Babu *Piari Lal Banerji*, for the appellant.

Sir *Tej Bahadur Sapru* and Dr. *Kailas Nath Katju*, for the respondent.

SEN and NIAMAT-ULLAH, JJ. :—This is an appeal by one Dharam Prakash, minor, under the guardianship of his natural mother Musammat Chandrawati, against the judgement of the Subordinate Judge of Meerut, dated the 21st of May, 1925, decreeing the claim of the plaintiff Srimati Kalawati Devi for a declaration that Dharam Prakash, the defendant, was not the adopted son of the plaintiff and that his adoption was invalid.

Lala Ram Saran Das owned considerable property, movable and immovable. He died in December, 1896, leaving two widows, Musammat Basanti and Musammat Kalawati Devi, and a mother, Musammat Bhawan Kunwar. Shortly before his death he executed a will, on the 6th of December, 1896, under which he made Musammat Kalawati the absolute owner of his entire property and gave her a right to sell, mortgage, donate or otherwise transfer the property in any way she liked. He also authorized Musammat Kalawati "to adopt, when she wished, any boy" of her choice and if the adopted son died he empowered her to adopt a second and a third boy in succession. He also fixed certain allowances for his mother Musammat Bhawan Kunwar and his senior wife, Musammat Basanti and made provision for their residence in a house known as "Mahal Sarai".

On the 10th of December, 1896, he added an important clause to the will, of which the following is the official translation:—"Further it is stipulated

that if Musammat Kalawati should like to adopt a son, she shall not adopt any son of the relations of her family or of that of Musammat Basanti or Bhawan Kunwar. If my brother, Jiwan, should give his son into adoption, she should adopt him; otherwise she should adopt some other boy, and she shall not have a power to make a gift. In case of necessity Musammat Kalawati shall have power to sell or mortgage a portion of the property." The original, of which the above is the translation, runs as follows :—"*Mukarrar shart yeh hai ke agar Kalawati gode lena pasand kare to apne ya Musammat Basanti ya Bhawan Kunwar ke khandani rishtedaron men se kisi pisar ko gode nah legi. Agar Jiwan mera bhai apna larka gode de to us ko warna dusre larke ko gode le; aur hiba na kar sakegi. Bashart zarurat Musammat Kalawati juzwi jaidad bai wa rehan kar sakegi.*"

Jiwan Ram had an only son of the name of Lalman. In the beginning of 1912 Musammat Kalawati Devi requested Jiwan Ram to give Lalman in adoption to her, but he refused and signified his refusal in a registered instrument dated the 9th of January, 1912.

Kalawati had a brother of the name of Brij Ballabh Saran, whose daughter Musammat Chandrawati was married to one Raja Ram of Najibabad. The defendant appellant is the only issue of this marriage.

On the 8th of August, 1918, Musammat Kalawati executed a deed of adoption, whereby she declared in unequivocal terms that she had taken Dharam Prakash in adoption to herself and her husband under his express authority.

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The present action was commenced by Musammat Kalawati on the 28th of May, 1924. In the plaint, she studiously avoids committing herself to the statement that, as a matter of fact, she had taken Dharam Prakash in adoption. She impugns the deed of adoption on five grounds:

(1) She complains that the document was procured from her by undue influence.

(2) The adoption itself was invalid, as Dharam Prakash belonged to a class or category of persons adoption from whom was expressly prohibited by the testator in the last clause of the will.

(3) Musammat Chandrawati had no authority of her husband to give her son in adoption.

(4) The adoption was not acted upon no mutation having been effected in favour of the defendant, who continued to reside with his mother Chandrawati at Najibabad and had never lived with the plaintiff.

(5) The adoption of an only son was opposed to Hindu law.

In defence, all these grounds were traversed by the defendant, who further pleaded limitation and estoppel.

The Subordinate Judge held that the factum of adoption was proved by overwhelming evidence, that adoption was voluntary and without any outside influence, that the plaintiff's claim was not barred by limitation, that the plaintiff was not estopped from challenging the adoption, that the adoption was not bad in law on the ground that Dharam Prakash was the only son of his father, but that the plaintiff was entitled to succeed on the short ground that on a true

construction of the last clause of the will, the defendant was a *khandani rishtedar* of the father of Musammat Kalawati and his adoption therefore contravened the express mandate of her husband.

The Subordinate Judge decreed the plaintiff's claim. The defendant appealed to the High Court.

The defendant in his appeal urges three points before this Court :—(1) The defendant as son of Raja Ram belonged to a very different family from that of Musammat Kalawati's paternal relation, and his adoption was not invalid as being in contravention of the will of Ram Saran Das, dated the 10th of December, 1896; (2) the plaintiff's claim is time barred; and (3) the plaintiff is estopped from repudiating the adoption or having the deed of adoption set aside.

As has already been pointed out the Subordinate Judge held that Dharam Prakash was a *khandani rishtedar* of Musammat Kalawati's father. This conclusion was based partly upon certain judicial decisions of this Court. In *Radhay Parshad* v. *Musammat Nannu* (1), KARAMAT HUSAIN, J., held that in the Urdu language *rishta* meant relation either by blood or by marriage. In *Khuman Singh* v. *Hardai* (2) it was held that a vendor's father's brother's widow was a *rishtedar qaribi*. In neither of these two cases the words *khandani rishtedar* occurred in the wajib-ul-arz. The question for determination in those cases was whether the expression *rishtedar qaribi* was wide enough, having regard to the entire context of the wajib-ul-arz, to include certain persons who were claiming a preferential right to pre-empt.

It is not permissible to interpret one document by another, the terms of which are neither identical nor even parallel. It is extremely dangerous to pick out

(1) (1910) 5 Indian Cases, 669. (2) (1888) I. L. R., 11 All., 41.

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stray phrases from a document which has been judicially interpreted and to extend the scope of the decision to a document of a different kind, couched in different terms, without any regard to the context, to the setting or to the surrounding circumstances.

The two rulings relied on by the Subordinate Judge were constructions of particular words in the wajib-ul-arz and the decisions proceeded upon the interpretation of the documents then before the court, regard being paid to the relation of the particular words to the entire context. The Subordinate Judge also refers to Fallon's English-Hindustani Dictionary and to Wharton's Legal Lexicon and finds that *khandan* means family, that family means lineage, and lineage means race, family, progeny, ascendant or descendant. From these he concludes that *rishtedaran khandani* means relations by blood, ascendant or descendant, whether in the male or female line of descent.

The learned Judge further argues that if the testator had intended to place the ban upon the male agnates of the family of the father of each of the three ladies and no further, he would have used the word *ek jaddi* and not *rishtedaran khandani* in the will.

In construing the last clause of the will so as to gather the intention of the testator, one has to place himself in the testator's arm-chair. On the 6th of December, 1896, Ram Saran Das had in the very first paragraph of his will provided that after his death Musammat Kalawati was to have an absolute estate with plenary powers of transfer. In paragraph 4 he arms Musammat Kalawati with authority "to adopt, when she wishes after my death, any boy whom she likes." It ought to be remembered that a power to adopt is in some ways analogous to a power of

appointment and must be distinguished from trust. As has been observed by WILMOT, C. J., "Powers are never imperative; they leave the act to be done at the will of the party to whom they are given and are not obligatory upon the conscience of the party interested."

It is a matter of some importance that the last clause in the will was *added* on the 10th of December, 1896, and by this addition the original will was modified in three important particulars:—(1) It restricted the field of Kalawati's choice by prohibiting the adoption of any son belonging to the family of the father of Kalawati or of the other two ladies, namely Musammat Basanti or Musammat Bhawan Kunwar; (2) it was directed that in making the choice preference must be given to the son of Jiwan who was the own brother of the testator; this direction was imperative; and (3) the estate of Musammat Kalawati was cut down to a limited estate. She was to have no power to make a gift. She was authorized to sell or mortgage only a portion of the property, in case of necessity.

It is not difficult to imagine that the terms of the will, dated the 6th of December, 1896, had reached the ears of Musammat Bhawan Kunwar and Musammat Basanti, the senior wife. In Indian families, it is a very rare occurrence that wills are kept under the seal of secrecy. It is not difficult to imagine that the senior wife and the mother felt very keenly not only the inequality of the legacies, but they felt aggrieved by the circumstance that Musammat Kalawati was made the absolute owner of the property with power of transfer and with a power of adoption unfettered by any limitations or restrictions whatsoever. It was felt that if the will, dated the 6th of December, 1896, were allowed to stand, there

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was nothing to prevent Musammat Kalawati from making a gift of the entire property to any member of her father's family. It was also felt that the same result could be reached by Kalawati taking a boy of her father's family in adoption. To avoid any jealousy or bitterness festering in the minds of these three ladies after the death of Ram Saran Das and to prevent the possibility of his property vesting in the paternal relations of the junior wife, the last clause of the will was deliberately added. To hold the balance even between Kalawati and the two ladies, dictated perhaps by a rude sense of justice, he also provided that no boy belonging to the family of the father of the other two ladies could be taken in adoption.

By the words *khandani rishtedar*, the testator intended to mean the agnatic relations of the father. There is not much of divergence between the connotations of these words and of the words *ek jaddi*.

The testator could possibly have no object in prescribing that not only the boys of the paternal house of these ladies should not be adopted but that he should travel further afield by prescribing that boys of the family, connected with the paternal house of these ladies by blood, marriage or adoption should be placed in the same class or category as the former.

In the case of a Hindu, his *khandan* consists of his lineal ascendants and descendants and his collaterals in the male line. Sisters and daughters after their marriage are transplanted from the family. They acquire the lineage or *gotra* of their husbands. The family tie is almost completely cut asunder, excepting within very narrow limits for the purpose of marriage or adoption. In Muhammadan families, where sisters and daughters inherit property side by

side with the males and where females acquire an absolute dominion in the inherited property, the word *khandan* may have a more extensive meaning.

In the present case, it would be most unreasonable to expect that Ram Saran Das should have intended to exclude the adoption of a boy belonging to a family, which was connected with the family of the paternal relations of the three ladies by marriage. The wider the area, the greater is the chance of a good and proper selection. This rule of common sense is very well understood by Hindus and is very fully appreciated by the Vaish class to which the testator belonged. By widening the area of exclusion Ram Saran Das would be acting most irrationally, be doing no good to himself and would be placing barriers and difficulties in the way of Musammat Kalawati in the matter of making a proper selection. The mischief aimed at was that the family of the father of either of the three ladies should not be enriched at the expense of the testator and this consummation was amply secured by placing restrictions within the narrow limits indicated above.

If the construction contended for by the respondent be accepted to its fullest extent and with all its implications, this would lead to very startling results. This would prohibit the adoption even of boys belonging to the family of the own brothers of the testator. The husband of Bhawan Kunwar was related to Bhawan Kunwar's father by marriage. Her husband's descendants or their progeny would under the circumstances come equally under the ban. A power to adopt, where it happens to be a special as distinguished from a general power, has to be strictly construed and no limitation should be imported into the document independently of what would flow from

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the plain etymological meaning of the document itself. Where the words are clear and unambiguous, full effect has to be given to those words, without any regard to extraneous circumstances, such as the conduct of the parties or the particular surroundings which might have influenced the intention of the testator. "*Khandani rishtedaran men se kisi pisar ko*" has to be construed with reference to the context, and etymologically it clearly means any son of the agnatic relations of the persons indicated by name in the document. Assuming that the expression is equivocal and might include a son of family connected by marriage with the family of the father of the ladies, in view of the circumstances set out above, it is not possible to hold that this could have been the sense in which the testator used those words.

The name of Kalawati's father was Sahu Nand Lal, who had a numerous family at Moradabad. One of his sons was Brij Ballabh Saran. His daughter, Chandrawati, on her marriage to Raja Ram, ceased to belong to the family or *khandan* of her own father. No Hindu testator would be expected to treat Dharam Prakash, the son of Chandrawati by Raja Ram, as a *khandani rishtedar* of Sahu Nand Lal. The adoption of Dharam Prakash, therefore, was clearly outside the prohibition imposed by the testator and was therefore valid in law.

It is next argued that the plaintiff's claim is time-barred. The contention is that Musammat Kalawati, having duly executed and registered a deed of adoption on the 8th of August, 1918, was not competent to maintain the declaratory suit without having the deed of adoption set aside. The deed of adoption not having been set aside within three years from the date when the facts entitling Musammat Kalawati to have the instrument cancelled or set aside became

known to her, under article 91 of the Indian Limitation Act, the present suit was barred on the 28th of May, 1924, the date when the action was commenced.

The specific article applicable to a suit to obtain a declaration that an adoption was invalid is article 118 which prescribes six years from the date when the alleged adoption became known to the plaintiff. The suit having been instituted within six years of the date of the adoption, it is clearly within time and is clearly within the scope of article 118. The main relief claimed in the suit is a declaration about the invalidity or illegality of the adoption. The adoption deed by itself does not confer any status upon the defendant as an adopted son. It only recites a fact and is evidence of such a fact having already taken place. A relief for the avoidance of the deed of adoption was, therefore, neither necessary nor obligatory. It was merely ancillary to the main relief claimed. There is no force in the plea of limitation, which is accordingly rejected.

It is next pleaded that the plaintiff is estopped from challenging the adoption of Dharam Prakash.

Section 115 of the Indian Evidence Act, which formulates the law relating to estoppel, runs as follows :—

"Where one person has, by his declaration, act or omission, caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

It is immaterial for the purpose of this suit whether this section is treated as a rule of evidence or

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a rule of equity. There is really no difference in substance between the two positions and the same legal result will flow from either.

A rule of estoppel is purely personal against the person estopped and cannot create any substantive right *in rem*, except against the person estopped or his personal representative. By the operation of this rule no status arises in favour of the defendant as an adopted son for all purposes under the Hindu law. In order to constitute estoppel, the following four conditions must be fulfilled:—(1) There must be a representation of the existence of a fact to another person; (2) the latter should believe in this representation; (3) he should act on this belief; and (4) by his so acting, his position should be materially altered.

No estoppel can ensure upon a representation, not of a fact, but of a mere opinion or of a point of law. If, therefore, a person alters his position to his detriment by acting on the representation of a mere question of opinion or a matter of law which would be equally accessible to both the parties no estoppel could arise. But where there has been a representation as to the existence of a fact to a certain person and the latter believes it and acts upon it and his position is altered, so that he cannot be put back to his original position at all, or, at any rate, without great loss and inconvenience, estoppel will undoubtedly ensue.

Musammat Kalawati as the favourite wife of Ram Saran Das was in a position to know his real intentions, apart from a recourse to the terms of the will.

The circumstances under which the last paragraph of the will was added can leave no room for doubt that the addition was made as the result of a

debate in the family conclave, and the real object of the addition so made was fully known to all the members of the family concerned.

Musammat Kalawati appears to be a particularly cautious lady, as is evidenced by the fact that she obtained from her brother-in-law Jiwan a formal document signifying his refusal to give his son in adoption. This goes to show that in the matter of the choice of a boy, she was not prepared to take any risks.

Exhibit B purports to be a letter sent by the plaintiff to Musammat Chandrawati. This letter bears no date. This letter may be construed as containing an implied representation that the defendant was a boy of the class whose adoption was approved and not prohibited by her husband. The letter is not explicit, but the above conclusion may be implied from the following texts :—"Lalli, I intend to adopt a boy. As soon as you receive this letter, you should consult your father-in-law about my intention to adopt Dharam Prakash. Ascertain the matter and write to me at once."

This, however, is a minor point and need not be pursued any further. The next letter, also bearing no date, is Exhibit C, addressed by the plaintiff to Musammat Chandrawati. The material portion of the letter may be quoted :—"I request you most respectfully to give Dharam Prakash in adoption to me. As soon as you receive this letter, please start for Najibabad with your brother Brij Lal and get Dharam Prakash for me from Govind Prasad (*sic*). . . I have fully shown the papers to the pleaders and made thorough inquiries from them. The pleaders have advised me that I can gladly adopt my nephew's son. No one here will dispute with Dharam Prakash. Please go and fetch him soon; please do not

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delay it. Do this for me out of the old love." The above letter is a clear representation that under the terms of her husband's will Musammat Kalawati was competent to adopt Dharam Prakash and that she had fortified her position in making the representation to Chandrawati by legal opinion sought and obtained.

It appears from the statement of one Basdeo Mal, who was the own uncle of Dharam Prakash, that a similar representation was made to him when he was deputed to the plaintiff for inquiry. He says: "My father sent me to inquire whether the plaintiff had authority to adopt. I came to Meerut and asked plaintiff if she had any authority by which she was going to adopt. She showed me the relinquishment of Jiwan Ram, brother of Ram Saran Das, saying that he did not want to give his son in adoption to plaintiff, and another paper she showed me was the will of Ram Saran Das giving her authority to adopt."

The only interpretation which can be put upon this statement is that Musammat Kalawati was making a representation that the son of Jiwan Ram being now out of the way, she was competent to adopt Dharam Prakash as a person belonging to a class whose adoption was authorized by the terms of her husband's will.

The adoption took place on the 8th of August, 1918, with due formalities and a certain amount of pomp and ceremony. A photograph of the scene was taken, which has been produced in this case. A deed of adoption was executed by Musammat Kalawati which bears her signature in autograph. This document was scribed by Har Prasad and is attested by no less than 22 witnesses, many of whom are men of respectability and position. It was presented for registration by Kalawati in person and she admitted its execution and completion before the registering officer.

This document contains amongst others the following recitals:—"Under the will my husband has also directed me that if I so like, I may, in order to perpetuate his name and the family, adopt a boy according to my own desire and liking. I have been thinking of it for about six years. I am now about 46 years old and life is transitory and uncertain. I therefore wish to fully carry out the will made by my husband. I have, therefore, of my own accord and free will, and while in a sound state of body and mind, taken Dharam Prakash, begotten son of Raja Ram, resident of Najibabad in the district of Bijnor, in adoption from Bibi Chandrawati, mother of the said Dharam Prakash, according to the Hindu law, *in compliance with permission* given to me by my husband Lala Ram Saran Das, deceased, under the will referred to above and I have performed all the ceremonies in connection with his adoption today." This is not all. The document proceeds:—"The said adopted son is a minor, aged seven years at this time. I shall be his guardian so long as I live. . . I, the executant, have made the adoption *according* to the directions and the will made by my deceased husband in order to perpetuate his name." It is to be borne in mind that the deed of adoption is a very solemn document and some sanctity attaches to the declarations made by the executant in view of the nature of the ceremony and the circumstances under which the document was drawn up.

It is clear from the evidence that a representation was made by Kalawati, that the said representation was believed by Chandrawati and that acting upon that belief she gave her son in adoption to the plaintiff.

An alteration of the position is inevitable from an adoption. The adopted son renounces his place in

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his natural family and acquires a legal status in the family to which he is introduced. It is not open to the adopted son to cast aside or renounce his status as an adopted son as though it were a mere cobweb by a mere sweep of the brush. Fresh avenues of responsibilities, domestic, religious and social, open out for him in his new sphere of life. It would, therefore, be idle to argue that by the adoption the position of Dharam Prakash was not materially changed.

From the facts detailed above there is no escape from the position that all the incidents of estoppel are present in this case and that Musammat Kalawati is precluded from challenging the adoption of Dharam Prakash.

The Indian High Courts and the Judicial Committee of the Privy Council have in similar cases and under similar circumstances applied the rule of estoppel. In *Dharam Kunwar* v. *Balwant Singh* (1), STANLEY, C. J., reviewed a large number of authorities of the Indian High Courts in support of estoppel. This decision was affirmed by the Privy Council in *Dharam Kunwar* v. *Balwant Singh* (2).

The learned advocate for the respondent asks us to distinguish these rulings on the ground that in those cases the adoption had been acted upon for a large number of years. Evidence that adoption has been acted on for a large number of years may be very material on the question as to the factum of adoption but is not a necessary ingredient for its validity. In the case of *Dharam Kunwar* (1) the feud began very shortly after the adoption. In the case in hand the plaintiff did not repudiate the adoption till about the 31st of July, 1923, when she made an open challenge and published the same in the advertisement columns of the *Leader* newspaper.

(1) (1908) I. L. R., 30 All:, 549: (2) (1912) I. L. R., 34 All., 398.

The defendant is still a minor. In view of his extreme youth, an arrangement appears to have been arrived at between Kalawati and Chandrawati that the natural mother was to live with the boy and the place of residence was divided between Meerut and Najibabad. It appears from the statement of Basdeo Mal, which may be accepted, that Dharam Prakash lived with Kalawati after his adoption and that he removed to Najibabad two years before the institution of the present suit.

Reliance is placed upon the further fact that in certain extracts from school registers (paper No. 189 and paper No. 30) the name of Dharam Prakash's father is entered as Raja Ram and not as Ram Saran Das. The adoption was made with the utmost publicity at the time when the entries were made. There was no dispute as to the adoption. The entry of the father's name is on the very face of it a misdescription, and whoever may be responsible for this mistake, Dharam Prakash, who is still a minor, cannot be saddled with the consequence thereof. It is probable that the mistake was due either to the ignorance or incompetence of the person who caused the entries to be made in the school registers. It has already been noticed that the representation made by Musammat Kalawati was of a matter of fact and not on a matter either of law or of opinion. Assuming that Kalawati was somehow or other misled in her interpretation of the last clause of the will, nonetheless, if she made the representation to Musammat Chandrawati as she appears to have done and the latter believed and acted upon it, the former will still be debarred from impeaching the validity of the adoption. It was held in the case of *Sarat Chunder Day* v. *Gopal Chunder Laha* (1), that the existence of estoppel did not depend

(1) (1892) I. L. R., 20 Calc., 296.

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on the motive or on the knowledge of the person who was holding forth the representation and that it was not essential that the intention of the party whose declaration, act or omission had induced another to act, or to abstain from acting, should have been fraudulent or that he should not have been under a mistake or misapprehension.

The following passage occurs in a well-known text book:—"In every case. . . the determining element is not the motive or the state of the knowledge of the party estopped but the fact of his representation or conduct as having induced another to act on the faith of such representation or conduct." (Caspersz on Estoppel, 1915, page 42.)

Lord HERSCHELL remarks, in the case of *Frederick Bloomenthal* v. *James Ford* (1):—"I cannot myself think that where an unequivocal statement is made by one party to another of a particular fact, the party who made that statement can get rid of the estoppel which arises from another man acting upon it, by saying that if the person to whom he made the statement had reflected and thought at all about it, he would have come to see that it could not be true. Of course, if the person to whom the statement was made did not believe it, and did not act on the belief induced by it, there is no estoppel."

The law on the subject could not have been stated in clearer terms.

The learned advocate for the respondent has referred this Court to two Privy Council cases in support of the proposition that there could be no estoppel in circumstances similar to those of the present case. In *Dhanraj Joharmal* v. *Soni Bai* (2), the factum of adoption itself was not established. Estoppel was sought to be raised not against the adoptive

(1) (1897) A.C., 156 (168.)

(2) (1925) I. L. R., 52 Calc., 482.

parents but against the niece of the adoptive father on the ground that her father had by his conduct treated the defendant as the adopted son of his own brother. Their Lordships held that estoppel was purely personal and the facts imputed to the father of the plaintiff did not constitute estoppel against him. The next case relied on was *Gopee Lall* v. *Musammat Sree Chundraolee* (1). Here, there was no representation of a matter of fact. The fact which was represented was admitted to be true but the parties, upon the assumption and admission of the said fact, arrived at the conclusion that the adoption was valid in law. It was held by their Lordships that these circumstances did not create any estoppel between the parties.

These two cases, therefore, are clearly distinguishable and are of no help to the respondent.

It is argued, though not very seriously, that Musammat Chandrawati was not authorized by her husband to give away her son in adoption and therefore the adoption was not valid under the Hindu law. The contention is not sound. In the absence of an express prohibition of the husband, the natural mother was competent under the Hindu law to give away her son in the *dattaka form*. Lastly, it is argued that Dharam Prakash was the only son of his parents and that his adoption is opposed to Hindu law. This contention is equally without force. The injunction of the Shastras against the adoption of an only son is only commendatory and not mandatory.

In view of what has been stated above, the appeal is decreed and the plaintiff's claim is dismissed with costs throughout.

Appeal allowed.

(1) (1872) L.R., I.A., Sup. Vol., 131.

Before Mr. Justice Sulaiman, Acting Chief Justice and Mr. Justice Weir.

1928 *May*, 29.

SHER SINGH AND OTHERS (DEFENDANTS) *v.* BASDEO SINGH (PLAINTIFF).*

Hindu law—Succession—Mitakshara—Sapindas—*Exclusion of grand-nephew by nephew.*

According to the Hindu law of succession of the Mitakshara school, as between a nephew and a grand-nephew (son of the nephew's brother) there is no representation, but the nephew will take the whole of the uncle's property to the exclusion of the grand-nephew.

Buddha Singh v. *Lallu Singh* (1), *Khettur Gopal, Chatterjee* v. *Poorno Chunder Chatterjee* (2) *Muttuvaduganatha Tevar* v. *Periasmi* (3) and *Marundayi* v. *Doraisami Karambian* (4) referred to.

THE facts of this case sufficiently appear from the judgement of WEIR, J.

Munshi *Panna Lal*, for the appellants.

Pandit *Shiam Krishna Dar*, for the respondent.

WEIR, J. :—This is a defendant's appeal in a suit brought to recover one half of the property of one Durjansal Singh. On the death of the survivor of Durjansal Singh's widow and daughters his two nearest relations were a nephew, the plaintiff, son of Maharaj Singh, (who was the elder brother of Durjansal Singh) and a grand-nephew, the defendant, son of Pokhpal Singh (a younger son of Maharaj Singh). The plaintiff and defendant are entered in the *khewat* as equal owners of Durjansal Singh's zamindari property. The plaintiff claims to be entitled to the whole

*First Appeal No. 370 of 1925, from a decree of Mirza Nadir Husain, Second Additional Subordinate Judge of Aligarh, dated the 24th of July, 1925.

(1) (1915) I. L. R., 37 All., 604. (2) (1871) 15 W. R., C. R., 482.
(3) (1892) I. L. R., 16 Mad., 11. (4) (1907) I. L. R., 30 Mad., 348.

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of Durjansal Singh's property as the nearer *sapinda*, but counsel for the defendant contends that since the plaintiff and the defendant are in the same group, or class, of *sapinda*—see *Buddha Singh* v. *Laltu Singh* (1),—the principle of representation applies, and the defendant is entitled to the share which would have gone to his father Pokhpal Singh, if the latter had been alive when the inheritance opened.

Counsel for the plaintiff relies on the well-known text of Manu,—"To the nearest *sapinda* the inheritance next belongs." Taken literally these words would clearly exclude the defendant from claiming any share of the inheritance as long as a nearer relation, such as the plaintiff, is alive, and this view of the effect of the text has been accepted by all modern text writers on Hindu law. Thus, for example, in the latest edition of Mayne's Hindu law, on page 838, it is said that "he", that is the grand-nephew, "cannot succeed as long as any nephew is alive, except by special custom"; and another text writer, namely Trevelyan (see Hindu Law, pages 349-350) lays down a similar rule, citing as an illustration of it chapter 2, section 4, placitum 8 of the Mitakshara:—"In case of competition between brothers and nephews, the nephews have no title to the succession; for their right of inheritance is declared to be on failure of brothers." Counsel for the defendant contends that this is merely an exception to a general rule, i.e., that the principle of representation applies to any class or group of *sapindas*; and that the text of Manu should be construed as meaning that the nearer class of *sapindas* excludes the more remote class. If there were such a rule, there would almost certainly be decisions interpreting or giving effect to it; but no such decision has been quoted to us;

(1) (1915) I. L. R., 37 All., 604.

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and there are certain cases which show that the text of Manu has not been construed in that way. In case No. 2 of section 5 of Macnaghten's Hindu Law, at page 67 of the precedents, it is stated that "on the death of the widow of the second brother the property left by her will be equally shared by the sons of her husband's brothers. The grandson of her husband's elder brother is excluded by them." The same principle was laid down by the officiating CHIEF JUSTICE of the Calcutta High Court in the following terms in *Khettur Gopal Chatterjee* v. *Poorno Chunder Chatterji* (1):—"My learned colleague, Mr. Justice MUKERJEE, has stated that which I have always understood to be the rule in such cases, in a clear and concise form by saying that amongst *sapindas* the nearest *sapinda* excludes those more remote." The reason for this rule was explained by Sir MUTTUSAMI AYYAR in *Muttuvaduganatha Tevar* v. *Periasami* (2), where he says:—"The distinction" (between obstructed and unobstructed inheritance) "is material only to the extent that, in the one case" (that is in the case of cognate or collateral relations) "the nearest male heir excludes the more remote, whilst in the other" (the case of sons and grandsons) "the doctrine of representation excludes this rule of preference. It is founded upon the theory that the spiritual benefit derivable from the three lineal male descendants is the same, though among collateral male heirs the *quantum* of such benefit varies in proportion to the remoteness of the male heir from the deceased male owner. . . Thus the rule, that to the nearest *sapinda* the inheritance belongs, applies alike whether the inheritance is obstructed or unobstructed, with this difference, viz., that where the last male owner leaves sons, grandsons and great-grandsons,

(1) (1871) 15 W. R., C. R., 482. (2) (1892) I. L. R., 16 Mad., 11.

their *sapinda* relationship confers equal spiritual benefit on him, though their blood relationship is not the same, and that they are all co-heirs within the meaning of the rule." This *dictum* of the learned Judge was accepted as correct by the Madras High Court in *Marudayi* v. *Doraisami Karambian* (1). Since there does not appear to us to be any reason why the text of Manu should not be given its literal meaning; and since no text from any of his commentators has been cited to us which would show that the words should be given any other meaning; and since the literal meaning appears to have been accepted by all the leading modern text-writers on Hindu law, we think that we ought to apply it in preference to an interpretation for which no authority has been cited. We, therefore, hold that the defendant is not entitled to any share in the property of Durjansal Singh.

There is only one other question at issue between the plaintiff and the defendant in this appeal.

[The rest of the judgement is not material for the purpose of this report.] The appeal should be dismissed with costs.

SULAIMAN, A. C. J. :—I have read the judgement of my learned brother, who has referred to the various authorities. I concur in his view, and would only like to add a few words on the scheme laid down in the Mitakshara determining the order of succession.

In part II, chapter II, section I, placitum 1, it is stated that the order of succession among all, on failure of them, is next declared. The passage of Yajnavalka gives the order: "Brothers likewise and their sons. . . . On failure of the first among these, the next in order is indeed heir to the estate." It

(1) (1907) I. L. R., 30 Mad., 348.

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is thus clear that brothers' sons come in only on failure of brothers. This is made fully clear in section 4, placita 7 and 8, which provide that "on failure of brothers also, their sons share the heritage . . ." "In the case of competition between brothers and nephews, the nephews have no title to the succession: for their right of inheritance is declared to be on failure of brothers."

In the case of *Buddha Singh* v. *Laltu Singh* (1) their Lordships of the Privy Council, affirming the view of this Court, held that brothers' grandsons are included in the expression "brothers' sons", and that they also are heirs. In that case the point did not arise and it was not decided what the rights *inter se* are between brothers' sons and brothers' grandsons.

Section 4, placitum 5 quotes the general rule laid down by Manu: "To the nearest *sapinda*, the inheritance next belongs." It would follow on principle that brothers' sons would exclude brothers' grandsons. Placitum 9, which gives brothers' sons a title through their deceased father, applies to the case where death occurs before a partition of the estate, and is not applicable to this case.

The learned advocate for the appellants contends that just as there is representation among sons and grandsons, in the same way there ought to be a representation among the brothers' sons and brothers' grandsons. His contention is that brothers' sons and brothers' grandsons fall within a single category designated by the expression "brothers' sons," and that there should therefore be no preference *inter se* between members of the same class. He therefore argues that the general rule laid down by Manu should not be applied to brothers' grandsons.

(1) (1915) I. L. R., 37 All., 604.

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As regards remoter relations, the learned advocate has to concede that remoteness involves an exclusion. In section 5 the heirs who are successively entitled are defined.

If we were to accept the contention on behalf of the appellants, we would have the anomaly of having representation among sons and grandsons, then exclusion of brothers' sons by brothers, then again representation among brothers' sons and brothers' grandsons, and lastly exclusion of remoter heirs by nearer heirs.

Having regard to the order of succession laid down in the Mitakshara, it seems only logical not to extend the principle of representation beyond the sons and grandsons. In the absence of any express provision to the contrary, the rule laid down by Manu should apply to brothers' sons, just as it admittedly applies to more distant collaterals.

BY THE COURT. :—The appeal is dismissed with costs.

Appeal dismissed.

FULL BENCH.

Before Mr. Justice Sulaiman, Acting Chief Justice, Mr. Justice Boys, Mr. Justice Banerji, Mr. Justice Kendall and Mr. Justice Weir.

EMPEROR *v.* PHUCHAI AND ANOTHER.*

1928 *July*, 10.

Criminal Procedure Code, section 109 (*a*) *and* (*b*)—*Application of the section, more particularly sub-section* (*a*).

Section 109 (*a*) of the Code of Criminal Procedure is applicable to a person who, being or coming within the local limits of the jurisdiction of a certain magistrate, takes precautions to conceal his presence with a view to committing an offence. It is not limited to the more restricted case of a person who, with a similar object, takes precautions to conceal the fact of his presence within the local limits of the jurisdiction of a certain magistrate.

*Criminal Revision No. 776 of 1927.

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So held by SULAIMAN, A.C.J., and KENDALL and WEIR, JJ.

The police received information that a number of persons were hiding themselves on a dark night at about midnight in a mango grove outside the *abâdi* of a village with a view to commit some offence. When the police went to the grove they found four persons sitting there, who, on being challenged, tried to run away. They were chased, and two of them were captured. They had house-breaking instruments (jemmies or *sabaris*) with them. When caught they first gave wrong names and addresses, and then, later on, disclosed their real identities. They were residents of the same sub-division.

Held by SULAIMAN, A.C.J., that section 109 (*a*) was applicable to the above facts, but not 109 (*b*).

Held by BOYS, J., that section 109 (*b*) was applicable, but not 109 (*a*).

Held by BANERJI, J., that neither section 109 (*a*) nor 109 (*b*) was applicable.

Held by KENDALL, J., that both section 109 (*a*) and 109 (*b*) were applicable.

Held by WEIR, J., that section 109 (*a*) was applicable, and quite possibly section 109 (*b*) also, though in the circumstances of the present case it was not necessary to decide whether or not that sub-section applied.

Emperor v. *Bhairon* (1) and *Emperor* v. *Himayat-ullah* (2), overruled. *Rashu Kabiraj* v. *King-Emperor* (3), *Sheikh Piru* v. *King-Emperor* (4), *Sharif Ahmad* v. *King-Emperor* (5), *Ghulam Jilani* v. *Emperor* (6), *Laltu* v. *Emperor* (7), *Rambirich Ahir* v. *King-Emperor* (8) and *Satish Chandra Sarkar* v. *Emperor* (9), referred to.

THIS was an application in revision on behalf of the Local Government against an order of the Sessions Judge of Benares. The opposite parties were found one night, about midnight, by the police hiding themselves in a mango grove outside the village of Dawatpur. Some other men who were with them managed to escape, but

(1) (1926) I. L. R., 49 All., 240.
(2) (1927) I. L. R., 49 All., 844.
(3) (1917) 27 C. L. J., 382.
(4) (1925) 41 C. L. J., 142.
(5) (1911) 8 A. L. J., 1097.
(6) (1918) 17 A. L. J., 432.
(7) (1919) 17 A. L. J., 891.
(8) (1926) I. L. R., 6 Pat., 177.
(9) (1912) I. L. R., 39 Calc., 456.

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Phuchai and Budhu were captured. When they were captured each had a *sabari*, or jemmy, on him. They at first gave false names and addresses to the police who arrested them; but when brought to the police station they gave their correct names and addresses. They were put before a Magistrate, who found that they had been concealing their presence with a view to committing a crime and had been doing so within the local limits of his jurisdiction. He accordingly made an order under section 109(*a*) of the Code of Criminal Procedure requiring them to give security for good behaviour. His decision was, however, reversed by the Sessions Judge on the strength of two rulings of the High Court—*Emperor* v. *Bhairon* (1) and *Emperor* v. *Himayat-ullah* (2). The Government filed a revision application in the High Court.

The Government Advocate (Pandit *Uma Shankar Bajpai*), for the Crown.

Dr. *Kashi Narain Malaviya* and Munshi *Jagannath Prasad*, for the opposite parties.

SULAIMAN, A. C. J. :—The facts of this case have been clearly found by the courts below and cannot be doubted. The police received information that a number of persons were hiding themselves on a dark night at about midnight in a mango grove outside the *abâdi* of a village with a view to commit some offence. When the police went to the grove they found four persons sitting there, who, on being challenged, tried to run away. They were chased, and two of them, the present accused, were captured. They had house-breaking instruments (jemmies) with them. When caught they first gave wrong names and addresses, and then later on disclosed their real identities. They are residents of the same sub-division. They were called upon to show cause under section 109, Criminal Procedure Code. The Magistrate came to the conclusion that the case fell

(1) (1926) I. L. R., 49 All., 240. (2) (1927) I. L. R., 49 All., 844.

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under section 109, sub-clause (*a*), and demanded security. The learned Sessions Judge, following the recent pronouncements of this Court, held that that sub-section was inapplicable. The Government have accordingly filed a revision from that order.

In the case of *Emperor* v. *Bhairon* (1), it was remarked that it is an entire mistake to read that sub-clause as applying to any person who takes steps to conceal himself in the sense of concealing his presence in the way in which a criminal conceals his presence, when he goes in the dark, or by a deserted road, or by some other secret means to commit a crime in his own neighbourhood; that it was not intended to deal with anybody, either a habitual resident or a person well known in the neighbourhood, trying to conceal himself, and that the offence contemplated is that of a person, probably, though not necessarily, coming from outside the jurisdiction into the Magistrate's jurisdiction for some nefarious purpose, and taking precautions to conceal the fact that he is present in that jurisdiction.

This case was explained in the case of *Emperor* v. *Himayat-ullah* (2) and it was stated that *Bhairon's* case cannot be said to have laid down that a person must go into the district from a place quite outside, and that a person living within the territorial jurisdiction of a Magistrate, who takes steps to conceal that he is there, namely, by removing himself from one part to another and disguising his identity or hiding his person, may be within the section.

Two arguments appear to have appealed to the learned Judges: Firstly that the expression "within the local limits of such Magistrate's jurisdiction" is part of the predicate "to conceal his presence"; and secondly that it is impossible to attribute to that expression a direction as to the jurisdiction of the Magistrate

(1) (1926) I. L. R., 49 All., 240. (2) (1927) I. L. R., 49 All., 344.

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over the offence, because for that purpose the words would be superfluous, the jurisdiction being clearly established by other provisions.

It will be convenient to consider the second argument first. Proceedings under section 109 are preventive in their nature and do not relate to any substantive offence. Sections 5 and 177, which confer jurisdiction, deal with offences and are inapplicable. No doubt under section 12, sub-clause (1), the local areas within which Magistrates have to exercise their powers are defined by the Local Government, and under section 36 all Magistrates have the powers conferred upon them under the third schedule, and schedule III (No. 5) empowers a first class Magistrate to require security for good behaviour under section 109. But if the territorial jurisdiction of the Magistrates over proceedings under chapter VIII had been separately fixed, there would have been no necessity to repeat similar expressions in all the relative sections. That expression occurs in section 107, sub-clause (2), section 108, section 109 clauses (*a*) and (*b*), as well as section 110. What is still more noteworthy is that section 107, sub-section (2), expressly provides that proceedings shall not be taken unless the person informed against is within the local limits of such Magistrate's jurisdiction. Had that provision been already laid down by other sections of the Act, there was no necessity to specify it there particularly. Similarly, section 108 emphasizes the presence of the person within the local limits of the Magistrate's jurisdiction, who, *within or without such limits*, does the act mentioned therein.

It seems to me that the repetition of that expression in section 109, sub-clause (*a*), was by no means superfluous. Its use was necessary to specify whether it is the Magistrate within whose jurisdiction the precautions are taken, or the Magistrate within whose jurisdiction the concealment is to be effected, who should have power

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to demand security. Obviously it is the Magistrate last mentioned who is authorized. Had the intention been otherwise, the sub-section would have been worded as "any person is, within the jurisdiction . . . . . taking precautions . . . ." The ordinary rule of grammar is that an adverb of place should refer to the nearest verb and not to the one more remote.

To say that the expression "within the local limits of such Magistrate's jurisdiction" is a part of the predicate "to conceal his presence" is, I would say with great respect, using ambiguous language, inasmuch as it does not clearly bring out the point which causes a difference of opinion, namely whether the expression is an adjectival clause qualifying the noun "presence", or an adverb of place modifying the verb "to conceal". If it is the former, it would mean concealing the fact of his being present inside the jurisdiction, while if it is the latter, it would mean that the act of concealing his presence must be within the jurisdiction. The former construction narrows considerably the scope of the sub-section, for which there seems to be no justification. In ordinary grammar an expression indicating a place is treated as an adverb of place modifying the nearest verb in the sentence, and not as an adjective qualifying a substantive noun.

It is clear that a man may be concealing his presence with a view to commit an offence, and yet he may not be concealing the fact that he is within the jurisdiction of a Magistrate. A common illustration would be that of a person, who is known to be a resident of a subdivision, and who secretly at night hides himself in a field close to a house with a view to commit burglary when the chaukidar falls asleep. He may continue this process night after night so long as the opportunity does not offer itself to him. He is certainly concealing the fact of his presence inside the field, which is situated

within the jurisdiction of the Magistrate, and yet he is in no way concealing the fact that he is present within the jurisdiction. On the other hand if the concealment of a man's presence is in a part of a larger area, there is undoubtedly a concealment in the larger area also.

I concede that the expression " concealing his presence " is not identical with " concealing himself ". A man may not conceal his presence at a place and yet he may conceal his identity. For instance, a man well known as Sir John Wilson may go to a new place where nobody recognizes him and may put up at a fashionable hotel under the name of Mr. Wilson. He cannot be said to be " concealing his presence ", though he is without doubt " concealing his identity ". On the other hand the giving out of a false name by a man in conjunction with other circumstances, for example, when he disguises himself, or hides himself, or when it is his duty to disclose his identity or absence from residence, as in the case of criminals ordered to notify their residence under section 563 of the Code of Criminal Procedure, may amount to " concealing his presence ".

To put a narrow construction on the section would make it practically useless, except in cases where persons come from outside the jurisdiction. So long as a criminal leads no one to believe that he has left his residence, he would be quite safe in concealing his presence as much as he likes. As a matter of practice criminals under surveillance, who go from place to place, generally take good care to report their arrivals at the police stations, except when they go out at night for the purpose of committing an offence during that night. On this narrow construction the only conceivable case possible, to which the sub-section would be applicable to people residing within the jurisdiction, would be when a man has left his known residence without intimation

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and has moved to another place within the same jurisdiction and is in hiding there. Such cases are rare, and when they do occur, the intention is not so much to commit an offence, as to avoid arrest. Thus, for practical purposes, the sub-section would be useless so far as criminals living within the jurisdiction are concerned. Indeed in *Himayat-ullah's* case (1) it was remarked that a man, who is deliberately preparing to commit a burglary and when caught by the police admits his intention, cannot be dealt with under the provisions of the section. The commonest form of cases is when criminals from one village go secretly at night to another village and remain in hiding in the house of a comrade in order to go out later at night and commit burglary. On the narrow view of the section such persons could continue the process night after night with impunity. Another difficulty would be that the police cannot always keep an eye on all the citizens every day and find out their whereabouts. So long, therefore, as the police have not become aware that a particular individual has left his house, and are not led to believe that he has left the jurisdiction, he can conceal his presence with a view to commit an offence without any fear.

Another extraordinary result would follow from the limited construction, in the following way. A theif may come from one sub-division and conceal his presence in another sub-division. He is obviously concealing the fact of his presence within the jurisdiction of the sub-divisional Magistrate in charge of the second sub-division and can be tried by him; but as the jurisdiction of the District Magistrate extends over the whole district, the man is not concealing the fact of his presence within the jurisdiction of the District Magistrate, that is, his presence within the district. He has never intended to lead any one to believe that he has left the district itself.

(1) (1927) I. L. R., 49 All., 844.

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The District Magistrate would therefore not have power to try him, although the Sub-Divisional Magistrate would. In my opinion if a person is concealing his presence in a part of the territorial limits of the jurisdiction, he is necessarily concealing his presence within that jurisdiction also.

I, therefore, think that if a man is taking precautions anywhere in order to conceal his presence, and that concealing is to be effected within the jurisdiction of a Magistrate who receives the information, such Magistrate has power to demand security, even though the residence of the person informed against within the jurisdiction is well known.

Now remains the argument which has found favour with the Calcutta High Court, namely, that the act contemplated by the sub-section is one which is continuous and not a momentary one. In the case of *Rashu Kabiraj* v. *King-Emperor* (1) SHAMSUL HUDA, J., considered that clause (*a*) referred to a continuous act and did not apply to a case where there was a momentary effort at concealment to avoid detection or arrest. Indeed, he went to the length of saying that clause (*a*) cannot apply to the case of a person brought under arrest, as such person cannot be said to be taking precautions to conceal his presence. Another Bench of the same High Court accepted that view, holding that the clause did not apply to a case where there is a momentary effort at concealment to avoid detection or arrest—*Sheikh Piru* v. *King-Emperor* (2).

Taking the language of the sub-section literally, one might at first sight think that the taking of precautions should continue till the time when the information is received, but a too literal interpretation would

(1) (1917) 27 C. L. J., 382. (2) (1925) 41 C. L. J., 142.

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lead to an absurd result. In view of the other provisions of the Act it is clear that such a narrow construction cannot be accepted. Section 55, sub-clause (1) (*a*), authorizes a police officer to arrest any person "found" taking precautions to conceal his presence within the local limits of his police station under circumstances which afford reason to believe that he is taking such precautions with a view to commit a cognizable offence. Section 60 requires the officer to produce the person before a Magistrate without unnecessary delay. We also find that a person who may be ordered to show cause under section 109 may actually be present in court (section 113), or may be in the custody of a police officer (section 114). Similarly, section 117 allows the order to show cause being made against a person who is present in court or who is brought before a Magistrate. It is thus clear that the sub-section cannot be interpreted too literally so as to necessitate the continuance of taking precautions till the information is received by the Magistrate.

I must concede that the use of the present continuous tense, " is taking ", is unhappy. But I have no doubt that it is intended to be comprehensive enough to cover the present perfect tense, " has taken " or " has been taking." The difficulty in holding that it is not a momentary but a continuous act that is contemplated would be where to draw the line. Is the act continuous when it lasts for one hour, one night, one week or more? Does it become continuous if it is repeated once, twice, thrice or more? Again a man may never conceal himself in the day time but may take precautions to conceal his presence night after night: Would the continuity be broken because there was no concealment during the day? Furthermore, the section is a preventive section intended to frustrate the designs of a criminally-minded person before they are carried out. If the idea of con-

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tinuity were pushed far enough, an arrest at the very outset of the preparation would be impossible, as the police would always have to wait till the designs have gone on for some time and have been persisted in. It seems to me that no time limit can be put on the taking of precautions. In every case it would be a question of fact whether the circumstances justify the inference that he has been taking precautions to conceal his presence and that there was the intention to commit an offence.

None of the courts below have applied sub-section (*b*). The learned Government Advocate also has not relied on this sub-section. In no reported case that I know of has it ever been held that if a man cannot explain his presence at a particular point of time or place, he is a person who cannot give an account of himself within the meaning of this sub-section. Clause (*a*) uses the words "conceal his *presence*, etc."; clause (*b*) uses the expression "give an account of himself". When two distinct words are used in the same section, the ordinary rule of construction is that they do not mean identically the same thing. I therefore do not think that the two words "presence" and "himself" are interchangeable and that the inability to give an account of himself is the exact equivalent of the omission to explain his presence at a particular time and place. The force of the word "cannot" is also to indicate utter inability. It has not the same meaning as "does not" or "did not". If a man proves that he is a resident of the neighbourhood, and is a man of substance, he must be said to be able to give a satisfactory account of himself, although he is not able to, or does not, give any convincing explanation why on a particular dark night he was found prowling about in a lonely place.

I do not see any force in the argument that because under section 54(1) the police can arrest any person having in his possession without lawful excuse any imple-

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ment of house-breaking, therefore such a man's case must fall under section 109 (*b*), if it cannot fall under any other section. A man may be living openly at his residential house, he may have possession of an implement of house-breaking which he may keep in a box in the house, and he may fail to discharge the burden of proving that he has lawful excuse for keeping it. And yet I fail to see how such a man can be said not to "give a satisfactory account of himself."

If we give to the words "give a satisfactory account of himself" the meaning "explain what he was doing", or "explain his conduct" at any particular time or place, we would make its scope too wide. The section would become applicable to a man who does not leave his house, and as to whom there is no proof that he is concealing his presence, and even no proof that he is making any preparation for committing a crime, but who, when questioned by the police, cannot explain any particular conduct of his.

The section does not say that the failure to give a satisfactory account of oneself must be accompanied by other suspicious circumstances which suggest that he may be contemplating a crime. On such an extended interpretation of the expression a man could be bound over merely because he does not discharge the burden of satisfying a Magistrate as to his conduct at a particular time or place. I do not think that the Legislature contemplated such an extension of its scope. To my mind the expression is somewhat akin to the other expression used in the same clause, namely "who has no ostensible means of subsistence." Of course, if a man is unable to explain his course of conduct, as distinct from failure to explain a momentary behaviour, he may very well come under this clause. I am not aware of any case where a man's failure to explain his presence has been held to bring him within the section. The

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cases referred to in *Emperor* v. *Bhairon* (1) mostly fell under sub-clause (*b*), and the opinions expressed therein support my view.

In *Sharif Ahmad* v. *King-Emperor* (2) the police were expecting a gang of thieves to visit the city, and a little before midnight seven or eight men were seen coming in from the side of a jungle. They were pursued, and the accused along with some others was arrested after a *lathi* fight. CHAMIER, J., held that there was no evidence that he was concealing his presence within the jurisdiction and so clause (*a*) was inapplicable. As to clause (*b*) the learned Judge remarked :—" The Magistrate seems to have required him to furnish security because he could not give a satisfactory account of himself (see clause (*b*) section 109, Code of Criminal Procedure). The applicant is a peon in the employ of the Municipality. His place of residence and occupation were well known. It seems to me that he is not a person of whom it can be said that he was unable to give a satisfactory account of himself."

Similarly, in *Ghulam Jilani v. Emperor* (3) the three accused were met on the road in Meerut by the police, who were expecting the arrival of men of bad character. Close to that place a jemmy was found. TUDBALL, J., remarked :—" The applicants gave an explanation of themselves and as a matter of fact it has been established that they are well-to-do and respectable residents of the city of Delhi . . . . . The present applicants clearly do not come within clause (*a*), as it was not alleged that they were taking precautions to conceal their presence with a view to committing an offence . . . . . The account they gave of themselves was correct, and the police of Delhi have reported that these three present applicants are persons who are well-to-do and of good character. In these circumstances I do not think that section 109 can apply to them."

(1) (1926) I. L. R., 49 All., 240. (2) (1911) 8 A. L. J., 1097.
(3) (1918) 17 A. L. J., 432.

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Again, in *Laltu* v. *Emperor* (1), the accused was arrested along with a number of persons in a lane at night. The Magistrate found that Laltu had not given a true explanation of his presence on that night at that spot. Having ascertained that Laltu resided within the jurisdiction of the Magistrate, PIGGOTT, J., remarked :—" I am quite satisfied that it cannot be said of Laltu that he could not give a satisfactory account of himself within the meaning of section 109 (*b*), Code of Criminal Procedure."

In this case also it had not been suggested before the Magistrate that the accused had been trying to conceal his presence.

Following the principles underlying the decisions of such experienced Judges, I hold that clause (*b*) is wholly inapplicable. I have already expressed the opinion that clause (*a*) applies.

BOYS, J. :—Phuchai and Buddhu were called upon by a Magistrate under section 109 (*a*) of the Code of Criminal Procedure to give security. In appeal the Sessions Judge held that he was bound by the decision in *Emperor* v. *Bhairon* (2) that section 109 (*a*) was not applicable to such a case, and, accepting the appeal, discharged the sureties. The decision in question was in fact also followed in *Emperor* v. *Himayat-ullah* (3). The first case was a decision of Sir CECIL WALSH, the then Acting Chief Justice, and Mr. Justice PULLAN. The later decision was also by Mr. Justice WALSH sitting with Mr. Justice BANERJI. The Local Government has filed an application in revision based on the single ground,—" That the learned Sessions Judge has erred in refusing to bind down the accused under section 109 of the Code of Criminal Procedure." The facts are simple. The police received information that a number

(1) (1919) 17 A. L. J., 891. (2) (1926) I. L. R., 49 All., 240.
(3) (1927) I. L. R., 49 All., 844.

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of persons were hiding themselves in a grove near a village. The result of the raid made on these men was that Phuchai and Buddhu were captured, while the others escaped. Phuchai and Buddhu were each found to be in possession of a *sabri* i.e., a jemmy. Both of them at first gave false names and addresses, but subsequently gave out their correct names and addresses. They were sent up for security to be taken under section 109, Code of Criminal Procedure. The Magistrate found that in view of the fact that Phuchai and Buddhu were found on a dark night at about midnight in a mango grove outside the *abâdi*, with house-breaking implements, and that when challenged by the constables they tried to run away, and that on being caught they first gave incorrect names and addresses in order to hide their identities, fully convinced him that "it had been established beyond doubt that the accused were taking precautions to conceal their presence within the local limits of my jurisdiction and that they were doing so with a view to commit some offence." He had further carefully examined the defence set up and gave his reasons for rejecting it. He held the case to fall under section 109 (*a*) and accordingly demanded security. In *Emperor* v. *Bhairon* (1), the case relied on by the learned Sessions Judge in allowing the appeal, the facts were, as the learned Sessions Judge correctly says, very similar. Three persons, who were *pasis* by caste, were found late at night outside a house in a village close to which they themselves lived, and a house-breaking implement was found upon one of them. When challenged they ran away and were caught and gave false names. Briefly the learned Judges held that the words "within the local limits of such Magistrate's jurisdiction" are "part of the predicate 'to conceal his presence'." In other words they held that before section

(1) (1926) I. L. R., 49 All., 240.

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109 (*a*) could be applied it must be found that the person to be held liable was not merely "concealing his presence" but "concealing his presence within the local limits of the Magistrate's jurisdiction". It is contended on behalf of the Crown that the words "within the local limits of such Magistrate's jurisdiction" are applicable to the words "any person" or to the words "taking precautions" or to the word "conceal", and that the clause should be interpreted as if it read that "any person within the local limits of such Magistrate's jurisdiction is taking precautions to conceal his presence" or as "that any person is taking precautions within the local limits of such Magistrate's jurisdiction to conceal his presence" or "to conceal within the local limits of such Magistrate's jurisdiction his presence." The question, then, for decision is whether, on the one hand, clause (*a*) is applicable if the person is found within the jurisdiction "taking precautions to conceal his presence," or if the person is found "taking precautions within the jurisdiction" to conceal his presence, or if the person is found taking precautions to "conceal within the jurisdiction" his presence, or whether, on the other hand, it is necessary for the Crown to prove that the person was taking precautions to conceal "his presence within the jurisdiction."

It may be conceded that the phraseology is not as clear perhaps as it might be. I should have been myself inclined to agree with Mr. Justice WALSH and Mr. Justice PULLAN that "the words are free from ambiguity" and to have decided the case in accordance with the view taken by them in *Emperor* v. *Bhairon* (1) without hesitation; but the fact that this revision has been filed at the instance of the Local Government and the discussion which followed at the hearing of the revision are sufficient to show that the meaning of

(1) (1926) I. L. R., 49 All., 240.

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the clause is not as clearly expressed as it might be. The fact appears to be that the grammatical meaning of the whole phrase depends in the case of each interpreter upon the exact pauses he makes between, or emphasis he lays on, each particular portion of the whole phrase. And we must therefore look outside the phrase itself for aid in its interpretation. I will therefore proceed to give my reasons for holding that the view taken in *Emperor* v. *Bhairon* (1) and followed in *Emperor* v. *Himayat-ullah* (2) is the correct one.

There can be no doubt that *primâ facie*, apart altogether from the language used, the Legislature may well have had in view either or both of two purposes.

First, it would obviously be reasonable for the Magistracy to desire power, and for the Legislature to confer that power, to control the actions of a man whose conduct was open to suspicion and who, whether his ordinary residence was outside the jurisdiction or inside it, was concealing the fact of his "presence within the jurisdiction." A Magistrate may rightly want to be in a position to control, if necessary, persons who are found hiding the fact that they are "present within his jurisdiction", and when the conduct of such persons further gives reasons for supposing that they are contemplating the commission of an offence, the Legislature might naturally be expected not to overlook the desirability of giving that power of control by the taking of security. This case, in the view that I hold and for which I will give my reasons, is provided for in section 109, clause (*a*).

Secondly, it would equally obviously be unlikely that the Legislature would omit to notice and provide

(1) (1926) I. L. R., 49 All., 240. (2) (1927) I. L. R., 49 All., 844.

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for the desirability of giving the Magistracy power to control a man whose conduct was open to suspicion, even though the man might be able to urge that his actual present place of residence within the jurisdiction and ordinary legitimate occupation within the jurisdiction were well known. That is the present case before us. The Crown has contended that this also is provided for by section 109, clause (*a*), and has not addressed us on the question whether the case is not provided for by section 109, clause (*b*). The defence has contended that it does not come within clause (*a*), and would of course gladly accept the Crown's failure to press upon our attention clause (*b*). In my view clause (*a*) does not cover the case but clause (*b*) does; the Legislature had in contemplation both purposes and has provided for both.

To consider, first, clause (*a*). In the first place we have the use of the word "presence",—"concealing his presence." The section does not say "concealing himself". It may be suggested that there is no very great difference, but to my mind there is a difference. The word "presence" itself suggests the idea of "presence in some particular locality", or at some particular time. In the present case there is no question of presence at any particular time.

Next, we find the phrase "*is taking* precautions", which suggests the idea of continuity. This latter consideration has been noticed in cases to which I shall presently have to refer.

In the earlier Codes we find in Act XXV of 1861 and Act X of 1872 the expressions "vagabonds", "arrest of vagabonds," "found lurking within the limits of such station". "lurking within his jurisdiction",—phrases not ordinarily applicable to a person who is known to be residing in the jurisdiction and

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whose residence is known. So far, then, as indications are to be found in the history of the provision, the interpretation put on the present section 109 (*a*) in *Emperor* v. *Bhairon* (1) finds some support.

Next, I will consider the scheme of the present Code, which was called in aid of his argument by the learned Government Advocate, but which upon examination I find repels rather than supports the view that he asks us to take. His contention was that in all the sections of the Code, whether dealing with offences or dealing with the prevention of offences, we find words referring to the territorial jurisdiction of the Magistrate or of the police officer and that they were inserted for the purpose of giving him territorial jurisdiction. That proposition, however, is not correct. A Magistrate is authorized to exercise certain powers by schedule III, and he is declared by section 36 to have those powers. But neither section 36 nor schedule III gives any indication within what territorial limits he may exercise those powers. For that we have to look to section 12. Section 12(2) declares that any Magistrate may exercise the powers given to him throughout the whole of the district, except so far as the Local Government or the District Magistrate, subject to the control of the Local Government, may have defined his local jurisdiction. By these sections the Magistrate has got his powers and his local jurisdiction defined. There were, however, cases in which doubt might arise. The sections already quoted would clearly be sufficient in cases where the offender, the offence and its consequences, etc., were all within the local jurisdiction of the Magistrate. But in particular cases the Magistrate needed further guidance. He finds that he has the powers and he has the local jurisdiction, but can he

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exercise those powers only when the offence, the offender, the consequences, etc. are all within his jurisdiction, or is it sufficient to give him jurisdiction that the offender is within his local jurisdiction or that the offence was committed within his local jurisdiction or that the consequences ensued within his local jurisdiction, etc.? To guide him on this point it was necessary in particular cases to insert words indicating the special condition necessary to the existence of his jurisdiction. Therefore in particular cases, where doubt might otherwise arise, we have his powers limited by such qualification as "if any person within the jurisdiction" or "if any person does so and so within the jurisdiction." Similarly, without the addition of some such words it would not be possible to say in regard to the prevention of offences whether it was sufficient that the offender was within the jurisdiction or whether it was sufficient that the offence was expected to be committed within the jurisdiction, etc. Now let us see how the Legislature dealt with this question in section 108. The governing factor might be the place where the person was who disseminated seditious matter, or it might be the place where the dissemination occurred. The Legislature directed the Magistrate to be governed by the consideration of the place where the person might be and not by the consideration where the dissemination took place. It therefore worded section 108 as "there is within the limits of his jurisdiction any person." This rendered it beyond doubt that at any rate the person must be within the jurisdiction, and it was sufficient if he was within the jurisdiction. Why, then, in dealing with section 109, if the Legislature had meant the governing factor to be the fact that the person was or was

concealing himself within the jurisdiction, should it not have similarly said that "any person within the local limits" or "taking precautions within the local limits" or "precautions to conceal within the limits"? As the person and the act of concealing will be presumably in the same place the natural thing to have said, if that was the intention of the Legislature, would have been "any person within the local limits." Take again section 110. We similarly find "any person within the local limits." I have not made any reference to section 107 because it is not possible to draw any conclusion therefrom and it will serve no useful purpose to lengthen this judgement by entering into a detailed discussion of that section. The words in section 107 of the Code of 1882 were somewhat similar to the words in section 109 (*a*) of the present Code. But there the punctuation was different and the interpretation was different from either of those which are supported in the present case. To clear the matter, the disturbing words were left out of the clause altogether and a complete new sub-section was enacted with special conditions.

Lastly, I am unable to find any single case in which section 109 (*a*) has received the interpretation which the Crown would ask us to give it. In *Sharif Ahmad* v. *King-Emperor* (1) the facts were as follows:—The police expected a gang of thieves to visit the city. A little before midnight seven or eight men were seen coming in from the jungle and were pursued. They ran to a certain shop and a *lathi* fight followed. Subsequently the accused was arrested at the shop with a *lathi* in his possession. Accused was an octroi chaprasi. The order initiating the proceedings showed that "action was taken

(1) (1911) 8 A. L. J., 1097.

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against the accused on the ground that they were habitual thieves and robbers and were taking precautions to conceal their presence within the limits of the Magistrate's jurisdiction." The Magistrate (trial court) demanded security, apparently under section 109 (*b*), because the accused could not "give a satisfactory account of himself." The District Magistrate on appeal said that the accused "prowls about at night and is a companion of scoundrels and that he bolts from the police and is armed with and uses a *lathi*." CHAMIER, J., held: "The Magistrate seems to think that the words 'give a satisfactory account of himself' mean satisfy the Magistrate that he spends his time or at least his leisure hours in a satisfactory manner. I cannot agree." "There is no evidence that the applicant was taking precautions *to conceal his presence within the Magistrate's jurisdiction. . . . . The applicant is a peon in the employ of the Municipality. His place of residence and occupation were well known.*" "Whether there was ground for taking action against the applicant under any other section, I cannot say. But it seems to me that the proceedings taken under section 109, Code of Criminal Procedure, cannot be supported." It seems clear that CHAMIER, J., held that where a person's place of residence and occupation were well known it could not be held that he "was taking precautions to conceal his presence within the Magistrate's jurisdiction" although he might be prowling about at night with scoundrels armed with and using lathis. The only inference from this is that section 109 (*a*) does not apply where the presence of the accused within the Magistrate's jurisdiction was not being concealed. All the other elements were there,—the lurking at night in company with scoundrels armed with *lathis*.

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In *Rashu Kabiraj* v. *King-Emperor* (1), a dealer, *whose presence and residence within the Magistrate's jurisdiction was well known*, was caught about midnight in a lane with two others who were in possession of house-breaking implements, and gave a false explanation of his presence at the time and place in question. It was held by TEUNON, J. (with "some hesitation") and SHAMSUL HUDA, J.,—following 8 A. L. J., 1097, and 39 Calc., 456, and *Bhuja* v. *Rex* (Ratan Lal's Criminal Reports, p. 3, 1872)—that the case did not come within either clause (*a*) or clause (*b*) of section 109. SHAMSUL HUDA, J., added that in his opinion clause (*a*) "refers to a continuous act"; and further that "clause (*a*) cannot apply to the case of a person brought under arrest as the accused was, for it cannot be said of such a person that he is taking precautions to conceal his presence." With this second conclusion as to the consequence of the arrest of the accused I do not find myself in agreement and I do not find that it has been since accepted in any other case, and I do not therefore think it necessary to discuss it further. The correctness of the first conclusion is, of course, in no way dependent on the correctness of the second.

In *Laltu* v. *Emperor* (2) (referred to in the later Allahabad case, *Emperor* v. *Bhairon*) PIGGOTT, J., said:—"I have ascertained that Laltu resides within the jurisdiction of the Joint Magistrate before whom proceedings were taken. I do not think it is possible to apply the provision of section 109." The reference by PIGGOTT, J., to having ascertained that Laltu resided within the jurisdiction of the Joint Magistrate can have only one meaning in reference to clause (*a*) and his finding that section 109 did not apply.

(1) (1917) 27 C. L. J., 382. (2) (1919) 17 A. L. J., 891.

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In *Sheikh Piru* v. *King-Emperor* (1) MUKERJI, J., agreed with SHAMSUL HUDA, J., quoted above, that the act of concealment referred to was a continuous act such as "passing under a false name" (not merely giving a false name once but "passing" under a false name, which is quite a different thing), or "taking precautions to conceal presence or identity at a place amounting to continuous course of conduct is what is meant by this clause."

In *Rambirich Ahir* v. *King-Emperor* (2), MILLER, C. J., held that the act of concealment need not necessarily be continuous, but there must be facts "indicating a desire to hide the fact that the accused is present within the local limits of the Magistrate's jurisdiction." The view of MILLER, C.J., as regards continuity is not really in conflict with that of SHAMSUL HUDA, J., and MUKERJI, J., for it is clear that a person may be arrested at the very beginning of what, if it had continued, would have been a continuous act. It is not necessary to prove that the act had been continuing for some time. A person might come inside the jurisdiction and be concealing himself and intend to continue concealing himself, and be caught at the outset. The act of concealment is nonetheless a continuous act in the sense used by SHAMSUL HUDA, J., and MUKERJI, J. It is quite different from the momentary or short-lived act of a person who does not mean to go on concealing his presence and is only doing so for the purposes of the particular house-breaking etc., on which he is then bent.

These cases were followed by the cases of *Emperor* v. *Bhairon* and *Emperor* v. *Himayat-ullah*, already referred to. I have been unable to find any case in which the contrary view has been taken. I

(1) (1925) 41 C. L. J., 142. (2) (1926) I. L. R., 6 Pat., 177.

am, therefore, of opinion on the interpretation of the section standing by itself, on a consideration of the history of the section, and after studying the scheme of the Act, that section 109(*a*) is only applicable where the person is concealing "his presence within the jurisdiction", and I find support for that view in all the cases that I have mentioned, and I can find no case to the contrary.

I would make it clear that I do not hold that the person must be a stranger to the jurisdiction. All that is necessary is that he should be concealing "his presence within the jurisdiction." He may be a stranger who has come from outside and is hiding himself within the jurisdiction or he may be a person whose ordinary residence is within the jurisdiction but who is hiding himself elsewhere within that jurisdiction. This latter case is illustrated in *Satish Chandra Sarkar* v. *Emperor* (1). There, a man whose ordinary residence was well known to be within the jurisdiction had absconded because of a warrant out against him. He left the jurisdiction, but on the warrant being cancelled he returned unknown to the authorities, and concealed himself in his residential house, only going out at night. So far, then, there was a concealing of his "presence within the jurisdiction" and the case under section 109(*a*) failed against him only because on the facts it was held that there was no proof that he was intending to commit an offence.

But in my view the matter does not end here. If it did so end it would mean that there was no means indicated by the Legislature for a Magistrate to deal with the case of a man whose ordinary residence and occupation within his jurisdiction were well known and who had not left that residence or occupation,

(1) (1912) I. L. R., 39 Calc., 456.

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but who was, e.g., temporarily out during the night on a house-breaking expedition. If such an untoward result followed from holding that section 109 (*a*) was not applicable it would not be a ground for holding section 109 (*a*) applicable in face of other considerations, but it would be a ground for pausing and again reconsidering whether those considerations were really valid. But as I have said, in my view the matter does not end with section 109 (*a*). The Government Advocate did not ask us to hold that the case could be brought within section 109 (*b*). He apparently accepted some decisions on the interpretation of that second clause in which, it is suggested, the view was taken that it was applicable only to cases where the person could not give a satisfactory account of himself "generally". Counsel for the defence naturally was prepared to accept that view and contended that his client could not be touched under either clause (*a*) or clause (*b*). I am myself unable to agree that clause (*b*) is not applicable. Mention in this connection has been made of two or three cases, but I do not think any of those cases supports a refusal to apply clause (*b*) to the present facts. All that CHAMIER, J., did in *Sharif Ahmad* v. *King-Emperor* (1) was to refuse to apply clause (*b*) to a case where the Magistrate seemed to think that clause (*b*) justified calling upon a person to satisfactorily account for his leisure time. Whether clause (*b*) applied or not to the particular facts was purely a question of fact in the particular case. Similarly, *Ghulam Jilani* v. *Emperor* (2), to which I have been referred, dealt, so far as clause (*b*) is concerned, purely with a question of fact, and similarly, so far as clause (*b*) was concerned, the case *Laltu* v. *Emperor* (3). In *Sheikh Piru* v. *King-Emperor* (4), it was held that the accused who had been

(1) (1911) 8 A. L. J., 1097.
(2) (1918) 17 A. L. J., 432.
(3) (1919) 17 A. L. J., 891.
(4) (1925) 41 C. L. J., 142.

charged under clause (*b*) had in fact given a satisfactory account of himself. So far as MUKERJI, J., seems in that case to have suggested that under clause (*b*) a person has to account for his "presence within the jurisdiction" I am not able to see the justification for that gloss. The words "there is within such limits a person" are quite different to the wording of clause (*a*), and repel rather than suggest the idea that the person is in any way being called upon to account for his "presence within the jurisdiction" except in so far as that may be part of the general evidence under clause (*b*).

None of these cases seems to me to carry any real and considered suggestion of support to the proposition that the present case does not come within clause (*b*). It is obviously true that clause (*b*) does not justify broadly calling upon any person to satisfactorily account for how he spends his leisure, but if there is definite evidence that he has been caught spending a portion of that leisure in a manner giving rise to grave suspicion and he can give no satisfactory account of the incident, I am unable to see why clause (*b*) should not apply.

I can see no justification for limiting the plain, natural and unambiguous meaning of the words "cannot give a satisfactory account of himself." If a house-holder catches a man in his garden in the middle of the night armed with a jemmy and that man cannot explain what he was doing at that hour of the night armed with a jemmy in somebody else's garden, surely it is not using language in any other than its simple straightforward sense to say that "he cannot give a satisfactory account of himself." Those words do not refer to his domestic relations or his normal daylight orthodox occupations, but require him to give a satisfactory account of himself in

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relation to the circumstances which led up to his being called upon for an explanation. Can a man possibly be said to do otherwise than fail in giving a satisfactory account of himself who has to say: "I admit I was caught at night in the garden of so-and-so's house armed with a jemmy; I decline to explain what I was doing there" (or he gives a futile explanation), "but in the day-time I am a most respected member of society."

I would, therefore, hold that the facts found would fully justify us calling upon the person to furnish security under section 109 (*b*) and that such security might have been called for from Phuchai and Buddhu.

Before concluding, I would refer to one further argument which may properly be adduced in support of the conclusion at which I have arrived. It was remarked by one of the members of this Bench at the hearing that one would expect to find the Magistrate able to take security in cases where the police officer had been empowered to arrest under section 54 or 55. I would prefer to state the proposition similarly, but more widely, and, if I may say so, more accurately. One would expect to find that where a police officer has been empowered to arrest under section 54 or 55, the Code would make provision for the trial and punishment of the person for a substantive offence where the circumstances indicated that a substantive offence had been committed, and that where the circumstances under which the arrest took place only indicated the intention to commit an offence, one would expect to find the Code providing for the Magistrate being able to take security. Now we are not immediately concerned with cases where the accused has been arrested on the ground that the circumstances indicated that he had committed an

offence. So we may state the proposition simply thus, that we should expect to find that, where the circumstances under which the accused had been arrested suggested that the person had been intending to commit an offence, the Code would provide for the Magistrate taking security. With the proposition so stated I entirely, of course, agree. It would be futile to give the police officer power to arrest if no further action could be taken. Section 54, sub-section (1), clause "secondly", and section 55 sub-section (1), clauses (*a*), (*b*) and (*c*) deal with circumstances where security for the prevention of an offence is desirable, and in regard to which we should expect to find complementary power in the Magistrate to take security.

In accordance with this expectation, where a person has been arrested under section 55 (1) (*a*) by a police officer while concealing his "presence within the limits of the police station," we find the complementary power in the Magistrate under section 109 (*a*). It is of course apparent on the face of it that the local limits of the Magistrate's jurisdiction are wider than those of the police station (as the local jurisdiction of the District Magistrate is wider than that of the Sub-Divisional Magistrate); and the proposition is true that though a man be not concealing his "presence within the limits of the police station," it does not follow that he is not concealing his "presence within the limits of the Magistrate's jurisdiction." But the contrary proposition is not true. If a man *is* concealing "his presence within (the larger area) the police station," it does necessarily follow that he is concealing "his presence within (the larger area) the Magistrate's jurisdiction." To state the case as it is suggested the accused might state it to the Magistrate: "I ordinarily, and you know it, resided within your

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jurisdiction, though not within the limits of that thana. I may have been lawfully arrested. But you knew I ordinarily resided within your jurisdiction and you, therefore, cannot take security under section 109 (*a*)." There is an obvious fallacy in that it assumes that because the Magistrate knew the ordinary residence of the person he continued to know all along where the person was. The obvious answer is that as soon as the person left his ordinary place of residence and began to conceal his whereabouts the Magistrate could not in fact know where he was, and concealing his "presence within the jurisdiction of the Magistrate" had begun.

Similarly, where a person is arrested under circumstances coming within section 55 (1) (*b*), security can be taken from him under section 109 (*b*).

Similarly, where a person is arrested under circumstances coming within section 55 (1) (*c*), security can be taken from him under section 110.

There is no provision in sections 54 and 55 for arrest corresponding to the provisions for security under section 108, but that does not affect our argument.

The only remaining clause that we have to consider is section 54 (1) "secondly." A police officer may arrest "any person having in his possession without lawful excuse, *the burden of proving which excuse shall lie on such person*, any implement of housebreaking." Now here no element of attempted concealment is necessary to justify the arrest and therefore the complementary power of the Magistrate cannot be found in section 109 (*a*). Unless it is to be found in section 109 (*b*) I am unable to find any other section applicable. Here is, therefore, an additional argument in support of giving to the words "*cannot give a satisfactory account of himself*" their

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plain meaning and not by judicial decision narrowing their clear wide scope. The person arrested under section 54(1) "secondly", has thrown on him the burden of proving his excuse for possessing the implement of house-breaking. That is in my view covered by demanding that the person should give a satisfactory account of himself. If it is not covered by that, it is not, so far as I can find, covered by anything.

Finally, I would add that if there is any doubt as to the meaning of the interpretation of section 109 (*a*), and at best the meaning is admitted on all hands to be open to doubt, it is surely desirable to treat the present case as coming within section 109 (*b*) if it is at least clear that it does come within that clause.

As to the order which we should pass I think that ordinarily the order should be either, as the whole case has been gone into, a direction to the Magistrate to take security under section 109 (*b*), or, if that be considered necessary, a direction to the Magistrate to issue a fresh summons to the accused under section 109 (*b*). But we are informed that the accused persons have already been in jail for a considerable period, and I do not think that we should now order security to be taken, but should limit ourselves to giving a direction to the Magistrate that in the circumstances which he had before him notice should be issued, and if the evidence justified it, security be taken under section 109 (*b*).

BANERJI, J. :—I see no reason to change the opinion I expressed in *Emperor* v. *Himayat-ullah* (1) regarding the interpretation of section 109 of the Code of Criminal Procedure. I would dismiss this revision.

KENDALL, J. :—I agree with Mr. Justice BOYS, that the provisions of clause (*b*) of section 109 of the

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Code of Criminal Procedure will cover the present case. I need not add anything to his remarks or to the reasons which he gives for holding that this clause is applicable. The case, however, was argued before us as one under clause (*a*) of that section, and I regret that I am not able to follow him throughout in his judgement when it deals with that part of the case.

Two interpretations have been put on clause (*a*). Without undue repetition I may say that according to one interpretation the clause means that security may be taken from any person who is taking precautions within the local limits of the Magistrate's jurisdiction to conceal himself. According to the other interpretation, security can only be taken if the person is taking precautions to conceal *the fact that he is present within the local limits of the Magistrate's jurisdiction*. In either case, of course, there must be circumstances to show that the person is taking precautions to conceal himself with a view to committing an offence.

The wider interpretation has generally been applied in Magistrates' courts, but it is clear that there is much more authority in the judgements of this Court for the narrower interpretation, namely, that the clause means that the person must be taking precautions to conceal the fact that he is present within the local limits of the Magistrate's jurisdiction.

There are in my opinion, however, reasons for accepting the broader interpretation. It may, of course, be said that the clause has not been happily worded, and that if the Legislature had intended the words used to mean "is taking precautions within the local limits of such Magistrate's jurisdiction to conceal himself", those specific words would have been used. But it may be argued with equal force that

if it had intended the words to mean "taking precautions to conceal the fact that he is present within the local limits of such magistrate's jurisdiction" there is no reason why those words should not have found a place in the Act. Either interpretation may be put on the words themselves as they stand, as is proved from the fact that this Bench is divided in opinion as to which is the more natural interpretation of the words.

The conduct of the person will be the same in either case. He will be taking precautions to conceal *himself*, whether he is doing so with the more subtle intention of concealing the fact that he is present within the Magistrate's jurisdiction or not. What is to be the *ratio decidendi*? If the person concerned were asked whether he had been "concealing his presence within the jurisdiction" or whether he had merely been concealing "himself", it is unlikely that he would be able to give an intelligible reply, and the Magistrate would have to look to the attendant circumstances for an answer. It is argued that if the person's residence and occupation are well known to the Magistrate he cannot be held to be taking precautions to conceal "the fact that he is present within the jurisdiction" even if he is hiding in a grove at night with a number of other suspicious characters. in circumstances that point clearly to an intended burglary, and that in this case clause (*a*) cannot be used. If this be so, it is only a stranger to the Magistrate's jurisdiction who can be dealt with under clause (*a*). Now under clause (*a*) of section 55 of the Criminal Procedure Code an officer in charge of a police station may cause to be arrested "any person found taking precautions to conceal his presence within the limits of such station", if there is reason to believe that he is doing so with a view to committing a cognizable offence.

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I think that there can be no doubt that the words "taking precautions to conceal his presence within the limits" must have the same meaning as they have in section 109, and that the two sections are complementary to each other. If, however, the narrower interpretation of clause (*a*) of section 109 be assumed for the moment to be correct we are, I think, faced with a practical difficulty. For instance, if *A* and *B* are two persons living respectively in thanas Alpha and Beta, and their occupations and residences are well known within their own thanas; and if *A* goes into thana Beta and there conceals himself, and *B* goes into thana Alpha and there conceals himself, in suspicious circumstances; then, according to the interpretation we have assumed for the moment, the officer in charge of thana Alpha may and in fact should arrest *B*, and the officer in charge of thana Beta should arrest *A*, and take them before the Sub-Divisional Officer. That Magistrate, however, will not be able to deal with either of them under clause (*a*) of section 109 because they both have residences and occupations within his jurisdiction. In other words, conduct that renders a man liable to arrest by the "thanadar" under section 55 of the Criminal Procedure Code becomes blameless under section 109 in the eyes of the Magistrate. I do not believe that such an anomalous, indeed absurd, result can have been intended by the Legislature. Nor do I think that the difficulty can be met by arguing that as soon as the person concerned leaves his ordinary place of residence and begins to conceal himself, "concealing his presence within the jurisdiction of the Magistrate" begins. So far as the Magistrate's jurisdiction is concerned, it makes no difference whether the person crosses the boundary into another thana, or merely hides in a grove near his own village. If in the one

case he is concealing his presence within the jurisdiction of the Magistrate, he is doing the same thing in the other case, too; and the distinction between "concealing his presence within the jurisdiction of the Magistrate" and "concealing himself" disappears, or at any rate is too subtle to be of any practical value.

One other case has been suggested which would be covered by clause (*a*) if the narrower interpretation were to be accepted, viz. that of a man who is well known within the jurisdiction of the Magistrate, who leaves it openly, and then returns secretly and proceeds to conceal his presence there. The facts that he openly proclaimed his departure, that he did actually depart, and that he secretly returned, might no doubt be considered to be a series of precautions taken to conceal the fact of his presence within the jurisdiction. But such a case would be very exceptional; and it might forcibly be argued that the precautions were not all taken "within the jurisdiction of the Magistrate", in that they involved leaving that jurisdiction. I cannot persuade myself that clause (*a*) was intended to cover this exceptional case, and that it does not cover the case of a man whose residence and occupation are well known, but who takes precautions to conceal himself with a view to committing an offence. I would, therefore, accept the revision.

WEIR, J. :—The following are the facts of this case. The station officer of Rohanya received information on the 30th of December, 1926, that a number of persons were hiding themselves near the *abâdi* of village Dawatpur "in order to commit some offence." The station officer thereupon sent five constables to arrest those persons. The constables found the two respondents along with others in a mango grove near Dawatpur village at about 12 o'clock at night at the time when, according to one

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witness the moon had risen. The men who were in the grove fled, and all except the two respondents got away. When the respondents were captured, each of them had a *sabari* (a house-breaking implement) and a *lathi*. They at first gave false names and addresses to the police who arrested them; but, when brought to Rohanya police station, they gave their correct names and addresses. They both live within the limits of police station Mirza Murad, which is contiguous to police station Rohanya, both the stations being within the limits of the jurisdiction of the Magistrate before whom they were brought. The Magistrate held that they had been concealing their presence with a view to committing a crime and had been doing so within the local limits of his jurisdiction. He accordingly made an order under section 109(*a*) of the Code of Criminal Procedure, requiring them to give security for good behaviour; but his decision was reversed by the Sessions Judge of Benares, who followed two decisions of this Court, namely *Emperor* v. *Bhairon* (1) and *Emperor* v. *Himayat-ullah* (2). The question which we have to decide depends on the interpretation of section 109(*a*) of the Code of Criminal Procedure. That section provides that a Magistrate of the first class may require any person to show cause why he should not be ordered to give security for good behaviour if the Magistrate receives information that that person "is taking precautions to conceal his presence within the local limits of such Magistrate's jurisdiction, and that there is reason to believe that such person is taking such precautions with a view to committing any offence." In the two decisions which I have cited it was held that the words "within the local limits of such Magistrate's jurisdiction" are an adjectival phrase qualifying the

(1) (1926) I. L. R., 49 All., 240. (2) (1927) I. L. R., 49 All., 844.

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word "presence," so that the section would not apply to any person who attempted to conceal his presence at any particular spot within the local limits of the Magistrate's jurisdiction, unless he was attempting to conceal himself in order that the local authorities should not be aware whether he was within or without the local limits, i.e. was endeavouring to prevent the local authorities from being aware of the fact that he was anywhere within the local limits of the jurisdiction. The Government Advocate asks us to place another interpretation upon the words "within the local limits of such Magistrate's jurisdiction," namely, that they do not qualify the noun, "presence," but indicate the locality within which the act of attempted concealment must have taken place, in order to give the Magistrate jurisdiction to deal with the case.

Two arguments have been advanced on behalf of the respondents. First, that the words "is taking precautions to conceal, etc." indicate a continuous course of action and not merely one isolated act of attempted concealment. In support of this view two authorities have been quoted to us. In the first of these, *Rashu Kabiraj* v. *King-Emperor* (1), it was held by SHAMSUL HUDA, J., that section 109(*a*) "refers to a continuous act and does not, therefore, apply to a case . . . . . where there is a momentary effort at concealment to avoid detection and arrest," and also that "clause (*a*) cannot apply to the case of a person brought under arrest," (as the accused in that case was), "for it cannot be said of such a person that he is taking precautions to conceal his presence." The other Judge who heard the case, TEUNON, J., said that he had "with some hesitation" arrived at the conclusion that the facts did not bring

(1) (1917) 27 C. L. J., 382.

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the case within the provisions of section 109 of the Code. The facts were that at midnight the petitioner and two other persons were in a lane in the town with house-breaking implements; that when the petitioner was seen by the police he ran away and when arrested remained silent. The same opinion was expressed by another Bench of the Calcutta High Court in *Sheikh Piru* v. *King-Emperor* (1). The facts of that case were in some respects similar to those last mentioned. The appellant was loitering on Strand Road at 3 A.M. and endeavoured to hide himself when he saw a constable coming. There was no evidence to suggest that he was hiding, or attempting to hide, at the time when the constable first saw him, or that he was doing so with a view to committing any crime, and therefore his case was clearly outside section 109(*a*); but MUKERJI, J., one of the two members of the Bench which heard the appeal, said:—"I also agree in the view expressed by SHAMSUL HUDA, J., in the case of *Rashu Kabiraj* v. *King-Emperor* that clause (*a*) of section 109 refers to a continuous act and does not apply to a case where there is a momentary effort at concealment to avoid detection or arrest. In my opinion, passing under a false name or taking precautions to conceal one's presence or identity at a place amounting to a continuous course of conduct is what is meant by the clause. Moreover, such precautions for the purpose of concealment must be taken with a view to committing an offence." If a man merely hides himself in order to avoid arrest, I think that the case does not come within the scope of clause (*a*), but it seems to me that in the two cases which I have cited too much stress was laid on the use of the present tense in section 109 and on the necessity of establishing something in the nature of a continuous

(1) (1925) 41 C. L. J., 142.

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course of conduct before any person can be brought within the purview of clause (*a*). Under section 55(*a*) a Sub-Inspector may arrest without a warrant any person "found taking precautions to conceal his presence within the limits of his station;" so that a man who is brought before a Magistrate may have been arrested in consequence of having taken such precautions, and I do not see why the jurisdiction of the Magistrate should be ousted by the fact that the man has been arrested, especially as section 114, read along with section 112, of the Code clearly shows that a Magistrate may take action under section 109 against a person who is "in custody," because he is empowered by section 114 to issue "a warrant directing the officer, in whose custody the person concerned is, to bring him before the court."

As to the question whether the concealment must be continuous, I think that if it is begun and kept up with the object of committing a crime, it comes within the ambit of clause (*a*). A man may conceal his presence in various ways. He may endeavour to hide himself from sight, so that his presence cannot be perceived at all, or he may endeavour to conceal his identity either by adopting a disguise or by giving a false name; and, if he does this, not merely in order to avoid arrest, but with a view to being able to carry out a plan to commit a crime, I think it could be said of such a person that he was "taking precautions with a view to committing an offence." If the attempted deception is part of a scheme or plan, I do not see how the length of time which elapses before the concealment is discovered can be material. In the view which I take, it is not the length of time during which the concealment lasts, but the object which prompts the concealment, that determines whether the conceal-

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ment is or is not such as to come within the purview of section 109(*a*).

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I now turn to consider the point on which the arguments addressed to us chiefly centred, namely whether the words "within the local limits of such Magistrate's jurisdiction" qualify the noun, "presence," so as to restrict clause (*a*) of the section to what I may call, for the sake of brevity, a "within the local limits" presence, or whether they indicate the place where the concealment must take place in order to give the Magistrate jurisdiction. If sub-section (*a*), instead of using the words "to conceal his presence," had used a synonym such as "to hide himself," there could be no doubt that the words, "within the local limits," would refer to the verb. But, since the signification of the words "to hide" would not be wide enough to cover all possible ways in which a man might seek to prevent the police or a Magistrate from being aware that he was in the neighbourhood, or at a particular place, I think that the words "to conceal his presence" were used to cover all the methods of concealment which I have indicated above; because in my view the word "presence" in clause (*a*) connotes two things, actual bodily presence and identity, so that a man who adopts a disguise or gives a false name or makes arrangements to cause people to believe that he is somewhere where he is not, attempts to conceal his presence just as much as if he hides in a cellar where nobody can possibly see him. It was said in the two cases decided by this Court, and which I have already cited, that if the words "within the local limits" are attached to the verb they are unnecessary, because a Magistrate can only exercise his powers within the local limits of his jurisdiction. To this, I think, two answers may be given. First, that if the words are otiose, then clause (*b*) of section 109 shows that the

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Legislature was quite capable of using the words otiosely and *ex abundanti cautelâ*, because they would not be required in clause (*b*) any more than in clause (*a*); but I do not agree that the words are unnecessary. They are used in sections 107, 108 and 110, all of which sections are in *pari materiâ* with the section which I am considering, and I think that they are necessary for the purpose of showing which of two Magistrates should have jurisdiction in cases which might quite easily occur. Thus, if a man hid himself within one jurisdiction with a view to committing a crime in another, it might be a question which of the two Magistrates could take action against him. It has been said that the words, "within the local limits," taken in their context in this section, naturally accompany and qualify the noun "presence," and indicate what I have called a "within the local limits of the jurisdiction" presence. If this were so, the similar words in section 55(*a*) ought to be given the same meaning and the Code of Criminal Procedure would thus deal with three classes of presences, each fitting, as it were, inside the other, like those sets of boxes which are sold by vendors of toys in India, namely a "within the Magistrate's jurisdiction" presence, and then, inside that, a "within the police station limits" presence, and then, inside that again, actual presence upon some particular spot. The result of this would be to introduce a kind of sliding scale of presences, discriminating in favour of the local *badmash*. I think that clause (*a*) applies equally to all persons who, by attempting to conceal their presence with a view to committing an offence, have shown that they are a danger to any member or members of the public. I do not, however, attempt to disguise from myself the fact that, on account of their place in the section, the words "within the local limits" are

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susceptible of either of the two interpretations which I have indicated, and that, if the ambiguity had been present to the mind of the Legislature when the Act was passed, the Legislature could have chosen some other expression which would have indicated its meaning more clearly. Thus if a "within the local limits" presence had been intended, it would have been unnecessary to use the word "presence" at all; the obvious expression to use would have been, "conceal the fact that he is within the local limits" or "conceal the fact that he is anywhere within the local limits", whereas if the second meaning which, as I have said, I believe to be the correct interpretation had been intended it would have been better to have said, "taking precautions within the local limits of such Magistrate's jurisdiction to conceal his presence." I believe that the latter is the correct interpretation, both for the reasons which I have already given and for this additional and, to my mind, cogent reason, that it gives to the words "within the local limits" the same meaning as they have in section 109(*a*) namely, that of an adverbial phrase denoting place—the place where an act is done—instead of giving them an adjectival meaning qualifying the noun "presence" in such a way as to make the section work unevenly in the case of persons who are equally to blame and equally dangerous to the community.

I now turn to consider certain decisions of Judges of this Court which are said to support the view taken in the two cases which I have already cited, namely *Emperor* v. *Bhairon* (1) and *Emperor* v. *Himayat-ullah* (2). The first of these cases is *Sharif Ahmad* v. *King-Emperor* (3). In that case

(1) (1926) I. L. R., 49 All., 240. (2) (1927) I. L. R., 49 All., 844.
(3) (1911) 8 A. L. J., 1097.

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CHAMIER, J., held that a municipal chaprasi, who was alleged "to prowl about at night and be a companion of scoundrels and to bolt from the police and go about armed," could not be required to give security under section 109(*b*) as being unable to give a satisfactory account of himself. CHAMIER, J., said:—"The Magistrate seems to think that the words, 'give a satisfactory account of himself,' mean 'satisfy the Magistrate that he spends his time or at least his leisure hours in a satisfactory manner.' I cannot agree." The facts were that six or seven men were seen coming in from the jungle. They were pursued and ran to a shop where some *lathi* blows were exchanged. Sharif Ahmad and some others were subsequently arrested at the shop. No doubt CHAMIER, J., said that there was no evidence that the accused "was taking precautions to conceal his presence within the Magistrate's jurisdiction;" but that would have been true on either of the interpretations of the section. The next case is *Ghulam Jilani* v. *Emperor* (1), decided by TUDBALL, J. In that case the appellants and two other persons were met by the police on the road between Meerut city and the railway station. The police had been informed that a raid upon the town was contemplated by men of bad character, and had made preparations to counteract it. On being arrested, the appellants gave their names, and it turned out that they were well-to-do and respectable residents of Delhi. The evidence against them was that, somewhere close to the place where the police met them, a burglar's jemmy was found lying on the ground. In delivering judgement TUDBALL, J., said:—"The persons contemplated in the section" i.e., section 109, "are persons taking precautions to conceal their presence within the local limits of the Magistrate's jurisdiction, or persons who have no

(1) (1918) 17 A. L. J., 432.

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ostensible means of subsistence and who cannot give a satisfactory account of themselves." In *Emperor* v. *Bhairon* (1) this passage from the judgement of TUDBALL, J., is quoted, and it is observed that "although the learned Judge was only quoting the *ipsissima verba* of the section, yet, read in the context in which that quotation occurs, it appears that he dwelt upon the scope and ambit of the section in the sense which we are satisfied that it bears." I think that the context in the judgement of TUDBALL, J., shows that he was not thinking about the effect of the section as interpreted in *Emperor* v. *Bhairon* at all, because the very next words in his judgement are "the present applicants clearly do not come within clause (*a*), as it was not alleged that they were taking precautions to conceal their presence with a view to committing an offence." So little was TUDBALL, J., thinking of a "within the local limits" presence, that, in paraphrasing clause (*a*), he makes no mention of the words "within the local limits." The last decision is *Laltu* v. *Emperor* (2). The judgement in it is very brief and the facts are stated very shortly. PIGGOTT, J., says:—"The applicant was arrested by certain police officers along with a number of other persons in a lane in the city of Cawnpore under what were undoubtedly suspicious circumstances." He points out that the Magistrate of Cawnpore called on the applicant to give security because he had not given a true explanation of his presence on the night in question at the spot where the police arrested him. The learned Judge then says, "I have ascertained that Laltu resides within the jurisdiction of the Joint Magistrate before whom proceedings were taken," and adds "I do not think it possible to apply the provisions of section 109 of the Code of Criminal Pro-

(1) (1926) I.L.R., 49 All., 240 (244). (2) (1919) 17 A. L. J., 891.

cedure to the state of facts set forth above." If that very careful Judge had meant that even if Laltu had been found in hiding with house-breaking instruments, the fact that he resided within the jurisdiction of the Joint Magistrate would have been a complete excuse, provided that his residence was known, then I think he would have said so. But the case was really one under clause (*b*) of section 109, and all that PIGGOTT, J., decided was that, on the principle laid down by CHAMIER, J., in the case to which I have referred, it could not be said of Laltu that he could not give a satisfactory account of himself within the meaning of section 109, clause (*b*), of the Criminal Procedure Code.

A case which was not cited before us in argument, but which was referred to in one of the decisions of the Calcutta High Court with which I have already dealt, is that of *Satish Chandra Sarkar* v. *Emperor* (1). In that case the applicant, who appears to have been connected with an anarchist agitation and a conspiracy to commit dacoity, had returned to his father's home in Calcutta on the 9th of August, 1911. On the 12th of August it was reported that he was concealing himself to avoid observation, and he was ordered to give security under section 109. The facts which were proved against him were that he secluded himself in the day-time and went out at night for exercise. The learned Judges who decided the case said that the prosecution had not made out that the applicant was taking any particular steps to conceal himself for the purpose of committing any offence, and on revision, they set aside the order against him, remarking that the whole of clause (*a*) must be read together and the object of the concealment must be with a view to committing some offence. They do

(1) (1912) I. L. R., 39 Calc., 456.

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not appear to have discussed, or even to have thought of, the distinction between a presence within the jurisdiction, and presence at a particular place.

I now return to the facts of the case before us. The two respondents were obviously concealing their presence, not specially with the object of preventing the police from detecting them, but in order to escape observation by anybody until an opportunity should occur for committing some crime of the nature of house-breaking. The fact that they were armed with *lathis* and had house-breaking implements with them shows that they were concealing themselves with the object of committing a crime. I think that they came within the scope of section 109(*a*), and that the learned Magistrate's decision was right.

After I had written my judgement I had the advantage of reading that of BOYS, J. I do not dissent from the view taken by him of the effect of clause (*b*) of section 109; but, as the present case was argued on clause (*a*) and as I am satisfied that the latter clause applied, I prefer to base my judgement upon it.

ORDER OF THE COURT (BOYS and BANERJI, JJ., dissenting) :—The order of the Sessions Judge of the 4th of June, 1927, allowing the appeal and discharging the sureties on the ground that section 109(*a*) did not apply to the facts of the case was wrong. Section 109(*a*) did apply to the facts of the case. It is, however, unnecessary to pass any further order in view of the fact that the period of one year for which the Magistrate ordered the accused to furnish security has now elapsed, and there is nothing to indicate that the accused have given any further cause in the interval for calling upon them to furnish security. To this extent the application in revision is allowed.

REVISIONAL CIVIL.

Before Mr. Justice Mukerji and Mr. Justice Banerji.

MAHADEO PRASAD AND OTHERS (PLAINTIFFS) *v.* BADRI DAS, RAM SARUP AND OTHERS (DEFENDANTS.)* 1923 *June, 5.*

Civil Procedure Code, schedule II, paragraph 15(1)(c)—Arbitration—Award—Application to revise decree based on award on ground of invalidity of reference.

The words " or being otherwise invalid " in paragraph 15(1)(*c*) of the second schedule to the Code of Civil Procedure do not include the question whether there was or was not a valid reference to arbitration. An application in revision will therefore lie on the ground of the initial invalidity of the reference. *Kanhaiya Lal* v. *Jagannath Prasad, Hanuman Prasad* (1), *Gopal Das* v. *Baij Nath* (2) and *Tej Singh* v. *Ghasi Ram* (3), followed. *Ajudhia Prasad* v. *Badar-ul-Husain* (4) and *Hari Shankar* v. *Ram Piari* (5), referred to.

Where certain arbitrators appointed in the course of a pending suit at one time returned the papers to the court and said that they did not want to go on with the arbitration; but afterwards agreed to continue, and in fact pronounced an award on which a decree was passed in due course: *Held* that in such circumstances the award was not open to objection.

THE facts of this case are fully stated in the judgement of the Court.

Babu *Piari Lal Banerji*, Dr. *Kailash Nath Katju* and Dr. *Kashi Narain Malaviya*, for the applicants.

Sir *Tej Bahadur Sapru*, Munshi *Harnandan Prasad* and Munshi *Sheo Prasad Sinha*, for the opposite parties.

*Civil Revision No. 164 of 1927.

(1) (1920) I. L. R., 43 All., 305. (2) (1925) I. L. R., 48 All., 239.
(3) (1927) I. L. R., 49 All., 812. (4) (1917) I. L. R., 39 All., 489.
(5) (1923) I. L. R., 45 All., 441.

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MUKERJI, J. :—This is an application on the revisional side of the High Court by the plaintiffs of a certain suit against a decree made on the 14th of June, 1927, by the Subordinate Judge of Basti.

It appears that two plaintiffs, one of whom is an applicant in this Court and the other of whom, having died, is now represented by the remaining two applicants in this Court, instituted the suit out of which these proceedings have arisen for recovery of a large sum of money amounting to nearly Rs. 20,000 from the defendants. After the trial began, the parties agreed to refer their differences to the arbitration of three gentlemen, namely Jokhai Ram, Jai Narayan Ram and Ram Kumar Marwari (the latter being the President of the Board of Arbitrators). An order of reference to the arbitrators was made by the learned Subordinate Judge on the day the petition was filed, namely, the 28th of January, 1927. The 26th of February, 1927, was fixed by the Judge for the submission of the award. By a petition dated the 23rd of February, 1927, and signed by the President, Ram Kumar Marwari, the arbitrators sent back the order of reference and the papers sent with it to them, to the court. In this petition they said that the parties had been summoned and asked to compromise the case, but they did not agree to do so and that as the arbitrators had no time to devote to the arbitration, the papers were being returned. On the 24th of February, 1927, the Subordinate Judge ordered the report to be put up on the date fixed, namely, the 26th of February, 1927. On the latter date, the court took down the statements of the prominent parties, one on each side. It recorded, in the proceedings of the day, that, according to the plaintiff, the arbitrators had returned the papers as they had no time to spare for arbitration and as the parties had failed to

come to terms. The proceedings proceeded to note that the defendant's version was that the plaintiff had prevented the arbitrators from deciding the case and had forced them to return the papers. The defendant suggested that the court should summon the arbitrators and inquire from them whether they were really willing to arbitrate. The court accordingly ordered that the arbitrators should be summoned to appear personally before it on the 12th of March.

On the 12th of March, the arbitrators appeared and on being questioned by the court they stated that they were willing to arbitrate. On the same day, one of the plaintiffs, viz., Tribeni Ram, made two applications before the court. By the first he said that as the arbitrators had definitely refused to arbitrate, there was nothing about which an inquiry could be made from the arbitrators themselves. On this, the court made the remark that it had already given the reasons in its order dated the 26th of February, 1927, as to why it had summoned the arbitrators. It noted further that on the said 26th of February, 1927, the applicant Tribeni did not object to the course adopted by the court and that, because the arbitrators were present, it was desirable to inquire whether they were willing to arbitrate. Evidently, it was after the disposal of this application that questions were put to the arbitrators and they expressed their willingness to arbitrate. By the second application Tribeni, one of the plaintiffs, made various allegations against the arbitrators. The Judge recorded an order stating that there was no sufficient reason for superseding the arbitration and if there were any other sufficient grounds for impeaching the award, the plaintiff would be heard in due time, i.e., after the award had been made.

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The arbitrators, thereafter, made an award. The plaintiffs filed objections to the award. The learned Judge heard the objections and dismissed them. Thereupon he ordered that a decree should follow the award. It is against this decree that the present application in revision has been filed.

Mukerji, J.

The only ground on which exception has been taken to the award is that the learned Subordinate Judge could not, in law, send back the case to the arbitrators after they had, by their report dated the 23rd of February, 1927, returned the papers and that, therefore, the whole award was vitiated. The first six grounds of the petition of revision are concerned with this point. The seventh ground, which related to the misconduct of the arbitrators and certain irregularities said to have been committed by the court below, was not pressed.

A preliminary point is taken on behalf of the defendants respondents that a petition in revision is not competent and that the decree which has followed the award cannot be impeached.

On this preliminary point the latest cases in this Court seem to have held that where the award is impeached on the ground that the very reference was incompetent, this Court can revise the proceedings and, if necessary, set aside the order of reference, with the necessary result that the award will fall through. An argument to the contrary is based on the last four words of sub-clause (*c*) of clause (1) of paragraph 15 of the second schedule of the Code of Civil Procedure, viz., "or being otherwise invalid." Paragraph 15 of the second schedule which deals with arbitration lays down that no award shall be set aside except on one of the grounds mentioned in sub-clauses (*a*) to (*c*). The question whether the ground

of objection to an award, that it is bad on account of a bad reference, comes within the words "or being otherwise invalid" has been sometimes debated in this Court. We are of opinion that on principle and on authority, the four words quoted do not and cannot cover an award where the reference itself is bad. The court is required to consider whether an award is good or bad. The finding of the Judge on the point is final and cannot be impeached in appeal. The examination of the grounds on which an award may be set aside will show that they all relate to something which has been done either by the parties or by the arbitrators. There is nothing, if we omit the words "or being otherwise invalid" for a moment, to suggest that the court is called upon to examine its own procedure and to pronounce an opinion whether its own procedure was good or bad. If a reference to arbitration is bad, it is so because the Judge's order was not justified in the circumstances of the case. If a court has to pronounce an opinion as to whether its own act, in making the reference, was justified or not, it is not to be expected, ordinarily speaking, that its own opinion on its own conduct should be allowed to have that finality which, for good reasons, is allowed to an award. On principle, therefore, the words "or being otherwise invalid" should not be taken as including the question whether there was a valid reference to arbitration.

Coming to authorities in this Court, while the cases of *Ajudhia Prasad* v. *Badar-ul-Husain*, *per* PIGGOTT, J., (1), and *Hari Shankar* v. *Ram Piari* (2), support the view that the question of the validity of the reference is one of the matters to be inquired into by the Judge under paragraph 15, clause (1), of schedule II of the Code of Civil Procedure, and that his opinion should be final on the point, the following

(1) (1917) I. L. R., 39 All., 489. (2) (1923) I. L. R., 45 All., 441.

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cases establish the contrary view:—*Kanhaiya Lal* v. *Jagannath Prasad*, *Hanuman Prasad* (1), *Gopal Das* v. *Baij Nath* (2) and *Tej Singh* v. *Ghasi Ram* (3).

We are of opinion that a revision is competent.

Mukerji, J.

On the merits, the point to be decided is really very short. The facts have been all given above. The argument for the applicant is that when the arbitrators refused to act, the course that was open to the court was indicated by paragraph 5, clause (1), of schedule II of the Code of Civil Procedure. The course was not to "coax" the arbitrators to reconsider their position and to persuade them to effect the arbitration. It is argued that the court should have accepted the resignation sent in by the arbitrators by their report, dated the 23rd of February, 1927, and should have allowed the parties to nominate other arbitrators and in default of their doing so, the court should either have itself appointed arbitrators or should have superseded the arbitration and proceeded with the case. On the other hand, the argument for the respondents is that the refusal of the arbitrators to arbitrate was not a final decision arrived at by them, that it was open to them to reconsider their position and to agree to arbitrate in the matter referred to them. Two cases have been cited by the respondents' learned counsel in support of their contention. Before we consider the authorities it will be proper to examine the Code itself.

According to the provisions of the Code of Civil Procedure, when an application is made to the court stating that the parties have agreed to refer their differences to arbitration, the court is bound to make a reference accordingly. Where a reference is made,

(1) (1920) I. L. R., 43 All., 305. (2) (1925) I. L. R., 48 All., 239.
(3) (1927) I. L. R., 49 All., 812.

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the court's jurisdiction is temporarily ousted and the arbitrators, if they accept the arbitration, become seised of the subject-matter in dispute. But the arbitrators may not accept the position assigned to them, or may be incapacitated by death or other circumstances from acting. Provision, therefore, had to be made as to what was to be done in those circumstances. The law, therefore, says that in the case of death or refusal of the arbitrators to act, the court has to give a chance to the parties to nominate fresh arbitrators and, in the case of their default, the court may either itself nominate arbitrators for the purpose or may supersede the arbitration; and, in the latter case, the court is to decide the case itself. It must be reasonably clear, therefore, that the court has to decide the question of fact whether a contingency mentioned above has occurred and whether it should give the parties a chance to appoint fresh arbitrators. In this particular case the arbitrators' report was received a few days before the date fixed, and the only order proper was one to put it up before the parties on the date fixed in the case. When the report of the arbitrators was taken up, the plaintiff present stated that the arbitrators were not inclined to take the trouble of deciding the case. The defendant present stated that the arbitrators were quite willing to arbitrate but that the plaintiff present in court had put obstructions and had induced them to give up the arbitration. The court, therefore, had two versions before it as to why the proposed arbitration was going to fall through. It is clear that no party to a reference to arbitration is entitled to resile from the arbitration or has a right to nullify the reference by doing some improper act. The court was, therefore, not only entitled, but was bound to inquire into the truth of the allegations of the parties.

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The court accordingly sent for the arbitrators. When the arbitrators arrived, the plaintiff Tribeni put in a petition stating that the arbitrators should not be questioned. This application was properly disallowed. The arbitrators, on being questioned, expressed their willingness to proceed with the arbitration. The result was that the order of reference held good and time was extended to the arbitrators to inquire into the matter and to formulate their award. No suggestion has been made anywhere that the court took up any improper attitude towards either of the parties or towards the arbitrators with regard to the reference. On plaintiffs' behalf our attention has been drawn to the statement of the President of the Board of Arbitrators, namely Mr. Ram Kumar, as to what happened on the 12th of March, 1927, when the arbitrators appeared. Mr. Ram Kumar was examined during the course of the investigation into the objections filed by the plaintiffs after the award was made. Mr. Ram Kumar stated that when the court asked whether they were prepared to arbitrate, he said that he should have two hours' time to consider the matter. The time was granted. Ram Kumar conferred with his colleagues, Messrs. Jai Narayan and Jokhai Ram, as to whether they should really devote (the word actually used is "waste") some of their time over the investigation of the affair. They all agreed that they might devote some time to the arbitration and, thereupon, they agreed to accept the reference. This gentleman was examined and cross-examined at great length, but no suggestion whatsoever was made that anything improper was done to persuade the arbitrators to accept the reference.

The position therefore is this. At one time the arbitrators thought that they should induce the

parties to come to terms and thereby save themselves the trouble of inquiring into the merits of the case. This was probably a natural desire. In this country nobody wants to decide a case as an arbitrator with the prospect of making the losing party his enemy. There is nothing on the record to indicate that previous consent of the arbitrators had been obtained before the reference to arbitration was made. The arbitrators, therefore, at one time, were unwilling to devote time to inquire into the merits of the case. Later on, without any improper inducement, they were persuaded to accept the reference and to make an award. There was, therefore, no case in which a definite refusal to arbitrate was made. If there had been such a refusal, the court had no alternative left but to allow time to the parties to nominate fresh arbitrators and in the case of such nomination to make a reference afresh. In default of such fresh nomination of arbitrators, the court could either nominate arbitrators of its own or could proceed with the case, after formally recording an order of supersession. No such thing happened. Therefore, we must take it that this is not a case in which the arbitrators can be said to have "refused to act."

Coming to the authorities, only two have been cited before us. The case of *Maharajah Joymungul Singh* v. *Mohun Ram* (1) is a Privy Council decision. It appears that a reference to arbitration was made and there were two arbitrators appointed. The arbitrators made an award, but it was signed by the arbitrators on different dates. From the decree that followed the award an appeal was taken to the High Court. By reason of the fact that no ten days' time had been allowed to take exception to the award and by reason of the fact that the arbitrators had signed

(1) (1875) 23 W. R., C. R., 429.

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the award at different times and not in the presence of each other, the case was remanded by the High Court and a direction was given that the arbitrators should come together and sign the award. When the case went back before the District Judge, one of the arbitrators, Mr. Sandys took exception to something (we do not know what) and sent in a resignation to the District Judge in the following language:—"I can discover no other alternative to be left me than herewith to submit my resignation". The learned District Judge was very unwilling to accept the resignation and induced Mr. Sandys to withdraw it. Mr. Sandys did withdraw and the two arbitrators then signed the award before the District Judge. Their Lordships of the Privy Council expressed the opinion that in the circumstances of the case, Mr. Sandys was not *functus officio* and he had "never formally divested himself of his character of arbitrator." The case before us is parallel in principle to the case before the Judicial Committee. The arbitrators, in this present case, sent in their resignation, ostensibly on the ground that the parties did not compromise the case. If the parties were going to compromise the case, there was hardly anything about which the three gentlemen could arbitrate. In view of the conflicting reasons given by the parties before the Judge as to the motive which persuaded the arbitrators to send in their resignation, the learned Judge made an inquiry and found that the arbitrators were willing to take up the responsibility which had been thrown on them. In the words of the Privy Council judgement, "The Judge was very unwilling to accept that resignation and induced Mr. Sandys to withdraw it." The action of the District Judge in the case before the Privy Council was not adversely commented upon by their Lord-

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ships of the Privy Council, and we do not see why we should regard the conduct of the learned Subordinate Judge in the case before us as in any way reprehensible.

The other case is that of *Har Narain Singh* v. *Bhagwant Kuar* (1). In this case, Janki Prasad, one of the arbitrators, had at one stage of the case sent in his resignation, but it was found that as a matter of fact he had all along been taking part in the arbitration proceedings. It was held that the proceedings were not in any way vitiated because of the resignation. The learned Judges referred to the case decided by the Privy Council, mentioned above, and upheld the award.

On authorities, therefore, the reference to arbitration continued to be valid in spite of the 'resgnation,' dated the 23rd of February, 1927, sent in by the arbitrators.

The result is that the application fails on the merits and is hereby dismissed with costs.

BANERJI, J. :—I concur.

Application dismissed.

FULL BENCH.

Before Mr. Justice Sulaiman, Acting Chief Justice, Mr. Justice Mukerji and Mr. Justice Boys.

RAM SINGHA AND ANOTHER (DEFENDANTS) *v.* SHANKAR DAYAL AND ANOTHER (PLAINTIFFS).*

1928 *June*, 11.

Procedure—Appeal—Change of law pending suit—Law by which the right of appeal will be governed.

A right of appeal in a suit is governed by the law prevailing at the date of the institution of the suit, and not

*Miscellaneous Case No. 1255 of 1927.

(1) (1887) I. L. R., 10 All., 137.

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by the law prevailing at the date of the decision of the suit or at the date of the filing of the appeal. *The Colonial Sugar Refining Company, Ld.*, v. *Irving* (1), *Delhi Cloth and General Mills Co., Ld.*, v. *Income-tax Commissioner* (2), *Daivanayaka Reddiyar* v. *Renukambal Ammal* (3) and *Bala Prasad* v. *Shyam Behari Lal* (4), followed. *Zamin Ali Khan* v. *Genda* (5), overruled.

THIS was a reference made by a Bench consisting of MUKERJI and BENNET, JJ., of the question :— "Whether the filing of an appeal is governed by the law obtaining at the date of the institution of a suit or by the law that may prevail at the date of the decision of it, or at the date of the filing of the appeal."

The facts which gave rise to the reference were as follows :—

The plaintiff Shankar Dayal brought a suit against Ram Singha and others for recovery of arrears of rent. The suit was instituted on the 12th of July, 1926, when the Agra Tenancy Act of 1901 was still in force. The learned Assistant Collector decreed the suit on the 23rd of December, 1926. An appeal was filed by the defendants before the learned District Judge of Mainpuri. The learned Judge ordered the memorandum of appeal to be returned for presentation to the proper court, by a decision dated the 31st of August, 1927. The memorandum of appeal was thereupon taken before the Collector of Etawah and that learned officer was of opinion that he had no jurisdiction to entertain the appeal and referred the case to the High Court, under section 267 of the Agra Tenancy Act. The Bench before which the reference came up for hearing referred it to a Full Bench.

(1) (1905) A. C., 369. (2) (1927) I. L. R., 9 Lah., 284.
(3) (1927) I. L. R., 50 Mad., 857. (4) (1928) 26 A. L. J., 406.
(5) (1904) I. L. R., 26 All., 375.

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On this reference—

Munshi *Badri Narain*, for the defendants.

Munshi *Baleshwari Prasad*, for the plaintiffs.

SULAIMAN, A. C. J., and MUKERJI and BOYS, JJ :—This is a reference to the High Court under the Tenancy Act. The facts are clearly set forth in the referring order of MUKERJI, J., and it is not necessary to repeat them.

A suit for arrears of rent was filed in the court of the Assistant Collector when the old Tenancy Act was in force. Before it could be decided, the new Act came into force on the 7th of September, 1926. The suit was decreed on the 23rd of December, 1926.

Under the old Act a defendant had undoubtedly a right of appeal to the District Judge if the decree went against him. Under the new Act, there is no appeal from the decision of an Assistant Collector of the first class, when the valuation of the subject-matter is less than Rs. 200.

The point of law that arises, therefore, is whether the coming into force of the new Tenancy Act, under which no appeal is provided, deprives a defendant of his right of appeal, which he would have had if the old Tenancy Act had continued to be operative.

It is admitted that there is nothing in the new Tenancy Act expressly providing that it shall affect all pending actions, or that it shall have retrospective effect. If, therefore, the right of appeal was a substantive right and not a mere matter of procedure, it could not be taken away by the new Act. On the other hand if it merely involved a question of procedure, that right may have been destroyed.

In our opinion the point is concluded by the pronouncement of their Lordships of the Privy

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Council in the case of *The Colonial Sugar Refining Company, Ld.*, v. *Irving* (1). In that case, ordinarily an appeal lay to their Lordships of the Privy Council from an order of the Supreme Court. While the matter was pending in that court, the law was amended so as to allow an appeal to the High Court. Their Lordships of the Privy Council held that the new Act could not deprive the party of his right to appeal to the Privy Council. Lord MACNAGHTEN remarked at page 372: "To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure."

That principle was re-affirmed by their Lordships in the case of the *Delhi Cloth and General Mills Co., Ld.*, v. *Income-Tax Commissioner* (2). The principle has been followed by a Full Bench of the Madras High Court in the case of *Daivanayaka Reddiyar* v. *Renukambal Ammal* (3). DALAL, J., has taken the same view in the case of *Bala Prasad* v. *Shyam Behari Lal* (4).

An earlier case of this Court, *Zamin Ali Khan* v. *Genda* (5), was decided before the pronouncement of their Lordships of the Privy Council in the case of *The Colonial Sugar Refining Company, Ld.* (1). That case decided that although a suit is disposed of while one Act is in force, the appeal is governed by a new Act which comes into effect before the appeal is filed. That case must be deemed to have been overruled by the pronouncement of their Lordships of the Privy Council.

We think there is no force in the contention that the Privy Council case proceeded on the general principles of Common Law and is therefore not applic-

(1) (1905) A. C., 369. (2) (1927) I. L. R., 9 Lah., 284.
(3) (1927) I. L. R., 50 Mad., 857. (4) (1928) 26 A. L. J., 406.
(5) (1904) I. L. R., 26 All., 375.

able to this case, which is governed by the U. P. General Clauses Act of 1904. Under section 6 of that Act, unless a different intention appears, the repeal of an Act cannot affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or affect any remedy or any investigation or legal proceeding commenced before the repealing Act shall have come into operation, and any such remedy may be enforced, and any such investigation or legal proceeding may be continued and concluded, as if the repealing Act had not been passed. It is clear to us that an appeal is a mere continuance of the original proceeding initiated by the filing of the plaint, and that the right to continue that proceeding cannot be affected by a new Act, unless it expressly says so. The U. P. General Clauses Act does not operate differently.

Our answer to the reference is that the right to appeal to the court of the District Judge was governed by the law prevailing at the date of the institution of the suit, and not by the law that prevailed at the date of its decision, or at the date of the filing of the appeal.

The case will go back to the Bench concerned with this opinion.

Before Mr. Justice Boys, Mr. Justice Kendall and Mr. Justice King.

JAGAT NARAIN AND ANOTHER (PLAINTIFFS) *v.* MATHURA DAS AND OTHERS (DEFENDANTS).*

1928
June, 12.

Hindu law—Joint Hindu family—Alienation of family property by managing member—Benefit to the estate—Whether transaction must necessarily be of a defensive nature—Criteria for judging propriety of transaction.

In order to sustain an alienation of joint family property made by the managing member of the family the transaction

*First Appeal No. 421 of 1925, from a decree of Rup Kishen Agha, Subordinate Judge of Moradabad, dated the 25th of July, 1925.

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must be one which is for the benefit of the estate and such as a prudent owner would have carried out with the knowledge available to him at the time. Transactions justifiable on the principle of "benefit to the estate" are not limited to those transactions which are of a "defensive nature".

The transaction must be judged, not by its actual results, but by what might have been expected to be its results, at the time it was entered into. The degree of prudence which might fairly be required from a person who was not the sole owner of the property might naturally be somewhat greater than that which might be expected in the case of a sole owner and might well be held to be that which would be demanded in ordinary cases from a trustee.

Hunooman Persaud Panday v. *Babooee Munraj Koonweree* (1), *Sahu Ram Chandra* v. *Bhup Singh* (2), *Palaniappa Chetty* v. *Sreemath Daivasikamony Pandara Sannadhi* (3), *Krishna Chandra* v. *Ratan Ram Pal* (4), *Muneshar Bakhsh Singh* v. *Arjun Singh* (5), *Tula Ram* v. *Tulshi Ram* (6), *Mahabir Prasad Misr* v. *Amla Prasad Rai* (7), *Jado Singh* v. *Nathu Singh* (8), *Sadhu Saran Prasad* v. *Brahmdeo Prasad* (9), *Kalika Nand Singh* v. *Shiva Nandan Singh* (10), and *Sheotahal Singh* v. *Arjun Das* (11), referred to. *Shankar Sahai* v. *Bechu Ram* (12), *Bhagwan Das Naik* v. *Mahadeo Prasad Pal* (13), *Inspector Singh* v. *Kharak Singh* (14) and *Rattan Chand* v. *Sri Thakur Ram Kishan Murarji* (15), not followed.

THE facts of this case sufficiently appear from the judgement of the Court.

Munshi *Panna Lal*, for the appellants.

Babu *Piari Lal Banerji*, for the respondents.

BOYS, KENDALL and KING, JJ. :—This case has been referred to a Full Bench by an order of reference of the Acting Chief Justice, Mr. Justice SULAIMAN, and Mr. Justice KENDALL. The question with which

(1) (1856) 6 Moo. I. A., 393.
(2) (1917) I. L. R., 39 All., 137.
(3) (1917) L. R., 44 I. A., 147; I.L. R., 40 Mad., 709.
(4) (1915) 20 C. W. N., 645.
(5) (1916) 19 Oudh Cases, 100.
(6) (1920) I. L. R., 42 All., 559.
(7) (1924) I. L. R., 46 All., 364.
(8) (1926) I. L. R., 48 All., 592.
(9) (1921) 61 Indian Cases, 20.
(10) (1921) 63 Indian Cases, 625.
(11) (1920) 56 Indian Cases, 879.
(12) (1925) I. L. R., 47 All., 381.
(13) (1923) I. L. R., 45 All., 390.
(14) (1928) I. L. R., 50 All., 776.
(15) (1928) 26 A. L. J., 777.

we are concerned is the meaning and implications of the term "benefit of the estate" as used in reference to transfers made by the manager of a Hindu joint family. The facts are simple and admitted. Nityanand had two sons, Rameshwar Prasad and Babu Partap Singh. Rameshwar Prasad had two sons, Jagat Narain and Krishna Narain. In 1864 certain property was purchased by Nityanand in the name of his wife. After the death of the parents, Rameshwar Prasad and Babu Partap Singh on the 20th of January, 1912, executed two sale-deeds of this property, each purporting to sell a half of one-third of mauza Kashipur by each sale-deed. By the two transactions jointly, then, these two persons purported to transfer the whole of one-third of mauza Kashipur.

It is admitted that two-thirds of mauza Kashipur had previously been sold for Rs. 15,000, and the sale price of this remaining one-third was Rs. 10,000. In view of these facts it is admitted that there can be no question but that the property fetched a full and fair value. The reason given for the sale of the property was that it was inconvenient to manage it, and again it is admitted that the property was situated 19 miles away from Bijnor; that neither of the two brothers lived in the locality, both had their permanent occupations elsewhere, and it was very difficult for them to manage the property successfully and to the benefit of the family. This is tantamount to saying, and it is frankly admitted, that in the ordinary sense of the term the transactions of sale were for the benefit of the family. The only question calling for decision is whether the transactions were for "the benefit of the estate", as the expression is used in Hindu law. One further fact calls for mention and that is that it is not disputed that the intention of the vendors was to devote the proceeds to the

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purchase of other landed property in a more accessible situation. The Rs. 10,000 was in fact placed in a Bank and for one year drew a substantial interest, and then the Bank failed. But it is not denied that the intention with which the property was sold was to buy other property, and the fact that the money was actually lost owing to the failure of the Bank is only an incident which can have no bearing on the question we have to decide.

It is admitted that the family was a joint family, and that the property transferred by the two sale-deeds of 1912 was joint family property. The present suit has been brought by the two sons, Jagat Narain and Krishna Narain, of Rameshwar Prasad to set aside the sales on the ground that they were not justified by Hindu law.

The case has been referred to us because of a conflict between certain rulings of this Court. As their Lordships in referring the case to this Full Bench have put it: "A wider meaning was attached to the expression 'benefit of the estate' in *Tula Ram* v. *Tulshi Ram* (1), *Mahabir Prasad Misr* v. *Amla Prasad Rai* (2), *Jado Singh* v. *Nathu Singh* (3), *Sadhu Saran Prasad* v. *Brahmdeo Prasad* (4), *Kalika Nand Singh* v. *Shiva Nandan Singh* (5) and *Sheotahal Singh* v. *Arjun Das* (6). On the other hand the expression has been taken in a narrower sense in the cases of *Shankar Sahai* v. *Bechu Ram* (7) and *Bhagwan Das Naik* v. *Mahadeo Prasad Pal* (8)." The "narrower sense" referred to is that in the last two cases mentioned (and also in *Inspector Singh* v. *Kharak Singh* (9) and *Rattan Chand* v. *Sri Thakur Ram Kishan Murarji* (10), cases also mentioned in the referring order) it has

(1) (1920) I. L. R., 42 All., 559.
(2) (1924) I. L. R., 46 All., 364.
(3) (1926) I. L. R., 48 All., 592.
(4) (1921) 61 Indian Cases, 20.
(5) (1921) 63 Indian Cases, 625.
(6) (1920) 56 Indian Cases, 879.
(7) (1925) I. L. R., 47 All., 381.
(8) (1923) I. L. R., 45 All., 390.
(9) (1928) I. L. R., 50 All., 776.
(10) (1928) 26 A. L. J., 777.

been suggested that joint family property can only be transferred when the transfer is in the nature of a "defensive transaction, e.g. for the purpose of saving the estate from some threatened injury." This view we shall have to express more precisely when referring to the cases in which that view has been taken.

We will proceed to examine the history of this question. We have proceeded to that examination by considering first the pronouncements of their Lordships of the Privy Council, and only in the event of finding those pronouncements otherwise than quite clear were we prepared to consider any departure from or amplification of those pronouncements justifiable. The earliest authoritative pronouncement is to be found in the well-known case of *Hunooman Persaud Panday* v. *Babooee Munraj Koonweree* (1). In that case their Lordships were dealing with the power of the manager for an infant heir. But it is accepted that the same principles will govern the powers of a manager of a joint Hindu family, and also, it may be added, the *shebait* of a temple. The passage which we proceed to quote has been quoted in numberless judgements, but we have no hesitation in quoting it again as it is indubitably the source of the law on this point. We were invited to consider passages from the *Mitakshara*, but their Lordships had those passages before them and they interpreted them in certain language and that language we must, and do of course, readily accept. Their Lordships said at p. 523 :—

"The power of the manager for an infant heir to charge an estate not his own, is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance,

(1) (1856) 6 Moo. I. A., 393.

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the charge is one that a prudent owner would make, in order to benefit the estate, the *bonâ fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded."

Here we have what is to us a quite unambiguous direction. The power to charge the estate can only arise "in a case of need" *or* "for the benefit of the estate." Further, it arises where "the charge is one that a prudent owner would make, in order to benefit the estate." Again, the elements to be considered are: "the actual pressure on the estate, the danger to be averted, *or* the benefit to be conferred on it, in the particular instance." We have emphasised ourselves, by placing the word "or" in italics, the fact that benefit of the estate such as a prudent owner would endeavour to effect is by itself a sufficient justification for the creation of the charge. Nowhere is there a hint in this pronouncement of their Lordships that there need be necessarily any element of "danger to be averted." In other words, we cannot find in this pronouncement any justification whatever for the suggestion that the transaction must necessarily be of a "defensive nature." There are only three comments which we think should be made here. We think that it is sufficiently obvious in itself that when their Lordships used the words "that a prudent owner would make" they did not mean to suggest that the presence or absence of prudence was to be determined by what the manager chose to say he thought to be prudent, but by what the ordinary man, knowing all the facts that were or could properly be within his knowledge at the time the charge was created, would consider to be prudent. Secondly, the prudence or otherwise of the transaction must not be judged by its

result, whether to the benefit or the injury of the estate, but must be judged in the light of the circumstances which were within the knowledge of the manager, or knowledge which he could reasonably be expected to have acquired. Thirdly, in view of the fact that he was not the sole owner of the property, but others had an interest in the property, the degree of prudence required of him would be greater, as in the case of a trustee, than if he were the sole owner.

In *Krishna Chandra* v. *Ratan Ram Pal* (1) and *Muneshar Bakhsh Singh* v. *Arjun Singh* (2) their Lordships' judgement was interpreted in the sense that we have interpreted it. Again, in *Sahu Ram Chandra* v. *Bhup Singh* (3) their Lordships of the Privy Council said :—

"In all of the cases where it can be established that the estate itself that is under administration demanded, or the family interest justified, the expenditure, then those entitled to the estate are bound by the transaction."

We next come to the case of *Palaniappa Chetty* v. *Sreemath Daivasikamony Pandara Sannadhi* (4). It is, as we hold, a misconception of their Lordships' pronouncement in this case that has given rise to the restricted view of the phrase "benefit of the estate" to which we have referred. Their Lordships said at p. 155 :—"It is impossible, their Lordships think, to give a precise definition of it" (benefit to the estate) "applicable to all cases, and they do not attempt to do so. The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation, these and such like things would obviously be benefits."

(1) (1915) 20 C. W. N., 645.
(2) (1916) 19 Oudh Cases, 100.
(3) (1917) I. L. R., 39 All., 487.
(4) (1917) L. R., 44 I. A., 147; I. L. R., 40 Mad., 709 (718).

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It is apparently in this passage alone that the theory has found its origin that the transaction must be of a defensive nature. It is true that the three or four instances given by their Lordships are all instances where the transaction was of a defensive nature, but we think there is no justification for the suggestion that their Lordships meant to say that transactions justifiable on the principle of "benefit to the estate" are limited to those transactions which are of a defensive nature. In the first place their Lordships were clearly merely giving certain cases where the objects to be attained "would obviously be benefits", and, secondly, they expressly went on to say, "The difficulty is to draw the line as to what are, in this connection, to be taken as benefits and what not." We cannot find in the quotations that we have made any justification for holding that the principles laid down in *Hunooman Persaud Panday* v. *Babooee Munraj Koonweree* (1) were being modified.

From this period onwards we find a number of cases in which the principles laid down in *Hunooman Persaud's* case were strictly followed, and a number of cases in which the proposition began to be shadowed forth, and in some beause crystallized, that the transaction must be of a defensive nature. This phrase "defensive nature" we have taken from some of those cases.

We do not intend to extend this judgement to undue proportions by considering all of those cases. We propose to limit ourselves to a reference to the cases in which that theory has found expression in this Court. The first of those cases is *Bhagwan Das Naik* v. *Mahadeo Prasad Pal* (2). It was a judgement of Mr. Justice RAFIQUE and Mr. Justice LINDSAY. That was a case of a speculative litigious suit, and

(1) (1856) 6 Moo. I. A., 393. (2) (1923) I. L. R., 45 All., 390.

it was held that such a suit was not for the benefit of the estate. With this view we think there can be no possible ground for disagreement. But their Lordships did say, when discussing the case of *Palaniappa Chetty* v. *Sreemath Daivasikamony Pandara Sannadhi* (1), after quoting the remarks to which we have already referred: "There is nothing in these remarks to encourage the notion that an adventure in the shape of a speculative suit which might possibly bring profit to the estate could properly be regarded as a 'benefit to the estate' or a 'legal necessity'. Their Lordships' observations rather import that any act for which the character of 'legal necessity' or 'benefit to the estate' can be claimed must necessarily be a defensive act, something undertaken for the protection of the estate already in possession, not an act done with the purpose of bringing fresh property into possession and which may or may not be successful under the chances attending upon litigation." We are satisfied, as we have already said, that a speculative litigation does not come within the principles laid down in *Hunooman Persaud's* case, nor do we think it could be justified by any other of the pronouncements of their Lordships. But we cannot agree with the further conclusion drawn that there is anything in *Palaniappa Chetty's* case to justify holding that the transaction "must necessarily be a defensive act." In considering that case we have already given our reasons for this view. The same considerations apply to the case of *Shankar Sahai* v. *Bechu Ram* (2), where their Lordships held that the litigation was in fact of the nature of a speculative litigation. Whether the particular circumstances indicate in our view that the litigation was speculative we need not consider. That was a question for

(1) (1917) L. R., 44 I. A., 147; I. L. R., 40 Mad., 709. (2) (1925) I. L. R., 47 All., 381.

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determination in the particular suit and not a question of the principles to be applied. It is this idea of the necessity that the transaction should be of a defensive nature (which, so far at any rate as this Court is concerned, found definite expression in the two cases with which we have just dealt) that started the current of opinion which is followed in the case of *Inspector Singh* v. *Kharak Singh* (1) and is reluctantly accepted in the case of *Rattan Chand* v. *Sri Thakur Ram Kishan* (2).

We, therefore, hold that we are bound and wholly bound by the pronouncements of their Lordships in *Hunooman Persaud Panday* v. *Babooee Munraj Koonweree* (3), *Sahu Ram Chandra* v. *Bhup Singh* (4) and *Palaniappa Chetty* v. *Sreemath Daivasikamony Pandara Sannadhi* (5); that there is nothing in *Palaniappa's* case which justifies the opinion that their Lordships were laying down that the transaction must be of a defensive nature or that they were in any way modifying the pronouncements made in *Hunooman Persaud's* case; that in *Hunooman Persaud's* case their Lordships merely laid down the law in the phrases that we have quoted; that they indicated that one of the elements which would justify the transaction is to be found in "benefit to the estate" and that there is not a hint in that judgement that if the transaction was to the benefit of the estate and was such as a prudent owner would have carried out with the knowledge that was available to him at the time, it could be set aside by anybody. We have already indicated that the degree of prudence would be the prudence which an ordinary man would exercise with the knowledge available to him; and that the transaction would have to be

(1) (1928) I. L. R., 50 All., 776. (2) (1928) 26 A. L. J., 777.
(3) (1856) 6 Moo. I. A., 393. (4) (1917) I. L. R., 39 All., 437.
(5) (1917) L. R., 44 I. A., 147; I. L. R., 40 Mad., 709.

judged not by its results but by what might have been expected to be its results at the time it was entered into; and that the degree of prudence which might fairly be required from a person who was not the sole owner of the property might naturally be somewhat greater than that which might be expected in the case of a sole owner. The degree of prudence to be demanded might well be held to be that which would be demanded in ordinary cases from a trustee.

As the whole case has been referred to us and the facts as we have set them out at the commencement of this judgement are admitted, it follows that the plaintiffs' appeal fails. The simple facts are that the adult managers of the family found it very inconvenient and to the prejudice of the family's interests to retain property, 18 or 19 miles away from Bijnor, to the management of which neither of them could possibly give proper attention, that they considered it to the advantage of the estate to sell that property and purchase other property more accessible with the proceeds, that they did in fact sell that property on very advantageous terms, that there is nothing to indicate that the transaction would not have reached a profitable conclusion but for the unfortunate accident that a Bank closed its doors. Judging these facts by the tests that we have held must be applied, we find ample reason for holding that the transaction was such a one as a prudent owner and even a prudent trustee might rightly have considered to be for the benefit of the estate, and that, therefore, that transaction cannot be impeached.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

MISCELLANEOUS CIVIL.

1928
June, 13.

Before Mr. Justice Sulaiman, Acting Chief Justice.

BRIJBHUKHAN AND OTHERS (PLAINTIFFS) *v.* TOTA RAM AND OTHERS (DEFENDANTS).*

Act No. VII of 1870 (*Court Fees Act*), *section* 4—*Civil Procedure Code, section* 149—*Memorandum of appeal presented on an insufficient stamp—Procedure.*

A court is not bound to accept a memorandum of appeal when it has been brought to its notice that the memorandum is insufficiently stamped. The concession contemplated by section 149 of the Code of Civil Procedure cannot be claimed as of right. *Ram Sahay Ram Pande* v. *Kumar Lachmi Narayan Singh* (1), *Lekh Ram* v. *Ramji Das* (2) and *Akkaraju Narayana* v. *Akkaraju Seshamma* (3), referred to. *Achut Ramchandra Pai* v. *Nagappa Bab Balgya* (4), dissented from.

No doubt, if an insufficiently stamped memorandum of appeal is accepted by inadvertence, time may be given to the appellant to supply the deficiency. But if the court is aware *ab initio* of the insufficiency of the stamp, it ought to return the memorandum to the appellant in order that he may, if the case admits, re-present it properly stamped and apply for an extension of time under section 5 of the Indian Limitation Act, 1908. *Jai Singh Gir* v. *Sita Ram Singh* (5), referred to.

THE facts of this case sufficiently appear from the judgement of the Court.

Pandit *Shambhu Nath Chaube*, for the appellant.

SULAIMAN, A. C. J. :—It seems to be the practice of some junior vakils to file appeals with insufficient court-fee stamps, knowing that they are insufficient, with a view to save limitation. I think that such deliberate attempts to get round the provisions of the Court Fees Act should not be tolerated. If a litigant has not got sufficient money ready to pay the whole court fees, the

*Application in Second Appeal No. Nil of 1928.

(1) (1917) 3 Pat. L. J., 74. (2) (1919) I. L. R., 1 Lah., 234.
(3) (1914) 27 M. L. J., 677. (4) (1913) I. L. R., 38 Bom., 41.
(5) (1923) 21 A. L. J., 333.

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appeal ought to be filed when such court-fees have been made good, accompanied with an application for extension of time. But the filling of an iunsufficiently stamped appeal, knowing it to be defective, should not be permitted.

No doubt the Bombay High Court has held that an appellate court is bound to accept an insufficiently stamped memorandum of appeal and to grant time to make it good :—*Achut Ramchandra Pai* v. *Nagappa Bab Balgya* (1). But this view has not been followed at Patna : *Ram Sahay Ram Pande* v. *Kumar Lachmi Narayan Singh* (2); nor by the Lahore High Court, *Lekh Ram* v. *Ramji Das* (3). The Madras High Court has also dissented from the Bombay view : *Akkaraju Narayana* v. *Akkaraju Seshamma* (4).

Section 149 of the Code of Civil Procedure no doubt gives a court power to allow deficiency to be made good in its discretion. The concession cannot be claimed as of right. But section 4 of the Court Fees Act expressly provides that no document shall be "filed, exhibited, or recorded in, or shall be received, or furnished by any of the said High Courts in the exercise of its original, appellate or revisional jurisdiction, unless in respect of such document there be paid a fee of an amount indicated in the schedules as the proper fee."

I am clearly of opinion that we have full power to refuse to accept a memorandum of appeal when it has the endorsement of the Stamp Reporter that the amount of the court fees paid is insufficient; otherwise the provisions of section 4 of the Court Fees Act would be evaded indirectly. That there is such a discretion is clear from the case of our own High Court, *Jai Singh Gir* v. *Sita Ram Singh* (5). Chapter III, rule 10, of our rules also contemplates a case where an insufficiently stamped document

(1) (1913) I. L. R., 38 Bom., 41. (2) (1917) 3 Pat. L. J., 74.
(3) (1919) I. L. R., 1 Lah., 234. (4) (1914) 27 M. L. J., 677.
(5) (1923) 21 A. L. J., 383.

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has been filed or used in the Court or office "through a mistake or inadvertence."

I accordingly refuse to accept these insufficiently stamped appeals and direct them to be returned to the counsel, with liberty to file them afresh on payment of full court fees, accompanied by an application for extension of time under section 5 of the Limitation Act, provided good cause is shown for the extension.

REVISIONAL CIVIL.

Before Mr. Justice Bennet.

1928
June, 19.

DEBI DAYAL (DEFENDANT) v. BALDEO PRASAD (PLAINTIFF) AND AUDH NARAIN AND ANOTHER (DEFENDANTS).*

Act No. IX of 1872 (*Indian Contract Act*), *section* 251—*Act No. IX of* 1908 (*Indian Limitation Act*), *sections* 19, 20 *and* 21—*Partnership—Joint Hindu family—Acknowledgement.*

When a joint Hindu family carries on a business, the members thereof are in the position of partners as regards persons dealing with that business.

An acknowledgement, therefore, made by one member of the family, of a debt due by the family in the course of its family business, can be availed of by the creditor as against the entire family. *Gadu Bibi* v. *Parsotam* (1) followed *Lalta Prasad* v. *Babu Prasad* (2), distinguished.

THE facts of this case sufficiently appear from the judgement of the Court.

Pandit *Narmadeshwar Prasad Upadhiya*, for the applicant.

Munshi *Binod Bihari Lal*, for the opposite parties.

BANERJI, J. :—These are two applications in revision, No. 8 of 1928 by Debi Dayal, defendant No. 1, and

*Civil Revision No. 8 of 1928.

(1) (1888) I. L. R., 10 All., 418. (2) (1909) I. L. R., 32 All., 51.

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No. 112 of 1928 by Gaya Prasad, defendant No. 3. The applications are directed against a decree of the Small Cause Court Judge of Cawnpore decreeing the claim of the plaintiff for Rs. 235-4-0, the price of cloth. The finding of the lower court is that "the defendants' business was a joint family business" and "acknowledgement by the defendant No. 2 (Audh Narain) was sufficient to keep the claim alive against the defendants Nos. 1 and 3 also."

The learned counsel for the applicant in revision has based his claim firstly on the ground that there is no evidence to prove that defendant No. 2 was a managing member of a joint Hindu family consisting of the other defendants. In regard to this it is sufficient to say that it is not found that he was a managing member. The second ground of objection is that because the plaintiff dealt with defendant No. 1 and defendant No. 2, the acknowledgement by defendant No. 2 could not bind defendant No. 1 (or defendant No. 3); and the third ground of revision is that the debt was barred at the date of acknowledgement. In regard to this third point it is sufficient to say that the acknowledgement was made on the 20th January, 1924, and the claim of the plaintiff is for goods supplied from the 10th of July 1921 and subsequent dates, all of which period is within three years from the 20th of January, 1924. The debt, therefore, was not time-barred at the date of acknowledgement. The argument has mainly centred round the liability of defendant No. 1, the uncle of defendant No. 2, and defendant No. 3, the full brother of defendant No. 2, for the ordering of goods by defendant No. 2 and the acknowledgement of liability by defendant No. 2. It was argued in the first place that the finding of fact that the defendants' business was a joint family business was without any evidence, but I find in the evidence of the plaintiff the statements—"They (the defendants) are all

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joint" and "they (the defendants) sell cloth." There is, therefore, evidence on which the finding that the defendants formed a joint family business was based. That business was a cloth business. The claim of the plaintiff is for cloth supplied on the order of defendant No. 2, and the acknowledgement on which the plaintiff relies is an acknowledgement in regard to the money owing for that cloth, by defendant No. 2. It would appear that as a result of the acknowledgement by defendant No. 2 further cloth was supplied by the plaintiff, because the acknowledgement was on the 20th of January, 1924, and the plaintiff's claim extends to cloth supplied on the 19th of April, 1924. The section which applies to liability of partners in business is section 251 of the Indian Contract Act which states as follows:—"Each partner, if he does any act necessary for, or usually done in, carrying on the business of such a partnership as that of which he is a member, binds his co-partners to the same extent as if he were their agent duly appointed for that purpose." In the present case the acts were necessary for, or usually done in, carrying on the business of such a partnership. I am of opinion, therefore, that these acts bind the remaining partners. When a Hindu joint family carries on a business, I consider that they are in the position of partners in regard to persons dealing with that business.

The learned counsel for the applicant bases his case on section 21, sub-section (2), of the Indian Limitation Act, which states as follows:—"Nothing in the said sections" (19 and 20) "renders one of several joint contractors, partners, executors, or mortgagees chargeable by reason only of a written acknowledgement signed or a payment made by, or by the agent of, any other or others of them."

I understand this section to mean that the mere fact that persons are partners does not make one partner liable

under an acknowledgement, etc., by another partner. But in the present case the liability arises under section 251 of the Indian Contract Act, because the acknowledgement was made in the course of the partnership business. Reference has been made to *Gadu Bibi* v. *Parsotam* (1). In that ruling it was held that where the acknowledgement was a transaction such as is contemplated in section 251 of the Indian Contract Act, then such an acknowledgement would extend a period of limitation against the other partner or partners, and section 21 of the Indian Limitation Act would not prevent the other partner or partners from being liable It is true that in that particular case there was a definite finding by the District Judge that there was authority for one partner to sign for the other. But all that was found was that such a finding brought the acknowledgement under section 251 of the Indian Contract Act. In the present case the acknowledgement is within section 251 of the Indian Contract Act, because it was an acknowledgement in the course of the partnership business Reference was made to *Lalta Prasad* v. *Babu Prasad* (2), but that was not a case of a partnership business, and the question of liability under section 251 of the Indian Contract Act did not arise. Accordingly the ruling is no authority in the present case.

For these reasons I dismiss the applications with costs.

Application dismissed.

(1) (1888) I. L. R., 10 All., 418. (2) (1909) I. L. R., 32 All., 51.

FULL BENCH.

Before Mr. Justice Sulaiman, Acting Chief Justice, Mr. Justice Mukerji and Mr. Justice Kendall.

SOHAN LAL AND OTHERS (DEFENDANTS) *v.* MOHAN LAL AND OTHERS (PLAINTIFFS).*

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May, 1.
June, 20.

Act No. IV of 1882 (*Transfer of Property Act*), *sections* 4 *and* 54—*Act No. XVI of* 1908 (*Indian Registration Act*), *sections* 17 *and* 49—*Usufructuary mortgage—Sale by unregistered deed of mortgagor's interest to mortgagee—Adverse possession—Registration.*

The predecessor in interest of one *D*, in 1873, mortgaged a house to *RM*, the mortgage being usufructuary. In 1901 *D* sold the house to *RM* for Rs. 90. A sale-deed was executed but was never registered. In 1919 (*D* having died in 1914) *D's* heir sold the same house to *ML* and others.

Held, on suit by the second purchasers for redemption that, although the unregistered sale-deed of 1901 was of no avail to pass title, and there could be no delivery of possession, inasmuch as the mortgagee had been in possession all along, yet the deed was available as evidence of a change in the nature of the mortgagee's possession, and, that being so, the possession of the mortgagee must be counted as adverse from the date of its execution. The mortgagor's heir had, therefore, in the year 1919, no title which he could transfer, and the plaintiffs' suit must fail.

The effect of section 4 of the Transfer of Property Act is not to make section 49 of the Registration Act applicable to documents which are compulsorily registrable by the provisions of section 54, paragraph 2, of the Transfer of Property Act and not by the provisions of section 17 of the Registration Act itself.

Per MUKERJI *and* KENDALL, *JJ.* (SULAIMAN, A.C.J., dissenting):—The sale by a mortgagor of his interest in property of which he has made a unufructuary mortgage is a sale of "tangible immovable property."

*Second Appeal No. 1274 of 1925, from a decree of R. L. Yorke, District Judge of Bulandshahr, dated the 25th of March, 1925, confirming a decree of Babu Kashi Nath, Subordinate Judge of Bulandshahr, dated the 26th of July, 1924.

The following cases were referred to :—*Sibendrapada Banerjee* v. *Secretary of State for Indian in Council* (1), *Muthukaruppan Samban* v. *Muthu Samban* (2), *Rama Sahu* v. *Gowro Ratho* (3), *Dawal Piranshah* v. *Dharma Rajaram* (4), *Rahmat Ali* v. *Muhammad Mazhar Husain* (5), *Ramasami Pattar* v. *Chinnan Asari* (6), *Corea* v. *Appuhamy* (7), *Mahendra Bahadur Singh* v. *Chandrapal Singh* (8), *Sheikh Hushmat* v. *Sheikh Jamir* (9), *Jhamplu* v. *Kutramani* (10), *Thomas* v. *Thomas* (11) *Khiaraj Mal* v. *Daim* (12), *Lalman Pande* v. *Sheo Narain Pande* (13) and *Khedu Rai* v. *Sheo Parson Rai* (14).

THE facts of this case sufficiently appear from the judgement of MUKERJI, J.

Munshi *Panna Lal* and Babu *Binoy Koomar Mukerji*, for the appellants.

Mr. *B. Malik*, for the respondents.

MUKERJI, J. :—This case has been referred to a Bench of three Judges for the decision of points of law which will be presently stated. It will be necessary to state briefly the facts of the case in order to see how the law applies and what rule of law will be applicable.

The facts that have been found by the lower appellate court and which, therefore, have been accepted for purposes of the determination of the points of law, are these :—There was a usufructuary mortgage of certain house property made in the year 1873. It was made for the sum of Rs. 1,000. In course of time, the property came to be owned by one Damodar, who, therefore, represented the original mortgagor. In course of time, the mortgagee's interest came to be owned by the defendant, Ragha Mal. Ragha Mal was the defendant No. 1 in the suit. He has since died and is represented

(1) (1907) I. L. R., 34 Calc., 207. (2) (1914) I. L. R., 38 Mad., 1158.
(3) (1920) I. L. R., 44 Mad., 55. (4) (1917) I. L. R., 41 Bom., 550.
(5) (1913) 11 A. L. J., 407. (6) (1901) I. L. R., 24 Mad., 449.
(7) (1912) A. C., 230 (236). (8) (1920) 24 Oudh Cases, 155.
(9) (1918) 52 Indian Cases, 558. (10) (1917) I. L. R., 39 All., 696.
(11) (1855) 2 Kay and Johnson, 79. (12) (1904) I. L. R., 32 Calc., 296.
(13) (1918) 17 A. L. J., 737. (14) (1917) I. L. R., 39 All., 423.

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Mukerji, J.

on the record by his successors in title. Damodar executed, on the 28th of February, 1901, a deed of sale in favour of Ragha Mal, in respect of the mortgaged property for a sum of Rs. 90. The sale deed was never registered. The mortgagees, and after them their successors in interest, continued to be in possession of the mortgaged property and are still in possession. Damodar died in 1914. His brother and heir, Krishna Ram, by a sale-deed dated the 28th of January, 1919, professed to sell the properties in suit to the plaintiffs, who are the respondents in this appeal. They brought the suit, out of which this appeal has arisen, for redemption.

The suit has been met with the plea that the mortgagor sold his rights to the mortgagee by the deed of 1901 and therefore no right is left in Krishna Ram or his transferee to sue for redemption. The plaintiffs urge that the sale-deed, being unregistered, was not admissible in evidence and did not transfer any title of Damodar to Ragha Mal and that, therefore, the plea of Ragha Mal that he had become the owner of the property is unmaintainable. On behalf of Ragha Mal it was contended that, conceding that the deed of 1901 did not transfer any title to him, he, at least, began to hold the property from 1901 adversely to the mortgagor and that, therefore, by 12 years' adverse possession he acquired the mortgagor's interest in the property, so that nothing was left, in 1919, which could be transferred by Krishna Ram to the plaintiffs.

These contentions of the parties have led to the framing of the following points for determination by the Bench of three Judges :—

(1) Whether the document of the 28th of February, 1901, is admissible in evidence for the purpose of showing a change in the character of the possession of the mortgagee.

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(2) Whether after what happened in 1901, the possession of the mortgagee became adverse and the claim is barred by limitation.

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Point No. 1.—This point involves several subsidiary points. These are :—

(*a*) Whether the interest of Damodar in the mortgaged property was a "tangible immovable property" or "intangible property" within the meaning of section 54 of the Transfer of Property Act.

(*b*) If it was "tangible immovable property", whether the transfer of it by an unregistered document is valid.

(*c*) Whether, if the interest of Damodar he "intangible property" and could be transferred only by menas of a registered document, the document was inadmissible in veidence, having regard to the provisions of section 49 of the Registration Act.

If Damodar's interest in the mortgaged property be tangible immovable property, the transfer could be effected either by a registered instrument or by delivery of property. As there was no registered document to effect a transfer, the transfer would be effective if there was a "delivery of property." But the property, professed to be sold, was already in the possession of the proposed transferee; it follows that, in the circumstances, there could be no delivery of the property. If a party be already in possession of the property, you cannot deliver the property to him again, without first asking him to vacate the property. This was the view taken in the Calcutta case of *Sibendrapada Banerjee* v. *Secretary of State for India in Council* (1). The contrary view was taken in the case of *Muthukaruppan Samban* v. *Muthu*

(1) (1907) I. L. R., 34 Calc., 207.

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Samban (1). As there is no case decided in this Court, I am free to express my opinion and it is that the Calcutta case lays down the better law. If we look into the reason of the rule we shall see at once that, for the publicity of the fact that title has passed, it was essential that possession should change. It was this change in possession that was accepted as a criterion of transfer. It must, therefore, be taken that, when the legislature said that a transfer of tangible immovable property of the value of less than Rs. 100 could be made by delivery of the property, it meant actual delivery and not a constructive delivery. It follows that the document executed by Damodar did not effect a change in the title, and, there being no delivery of the property, no title passed to Ragha Mal. It further follows that, under section 54 of the Transfer of Property Act, the document which purported to be a sale-deed of tangible immovable property, already in the possession of the vendee, of the value of less than Rs. 100, was compulsorily registrable.

Again, if the interest of Damodar was an "intangible property", the transfer could be made only by a registered document and in that case the registration of the document in question was compulsory under section 54 of the Transfer of Property Act. Whatever, therefore, may be the character of the property which Damodar purported to sell, it could be effectually sold only by a registered deed. In this view it is not necessary to determine the nature of the property.

The question, namely, whether a mortgagor's estate is a tangible immovable property or whether it is an intangible property has been debated at the bar and it is but proper that something were said on that point.

When the owner of, say, a house, which is free from incumbrance (incumbrance in a large sense of the word, including leases etc.) sells it, there can be no doubt

(1) (1914) I. L. R., 38 Mad., 1158.

that he sells a "tangible immovable property" within the meaning of section 54 of the Transfer of Property Act. But if we express the transaction as "a transfer of the interest of the owner" or "as the transfer of the proprietary rights" we can easily suggest that the transfer is only of "an interest" or "rights" and that, therefore, the transfer is of an "intangible property." But this would not be the correct view. We must therefore guard ourselves against looseness of expressions and must not lose sight of essential truth. The transfer of a house by the owner, therefore, must be a transfer of tangible immovable property. Now, when the owner makes a mortgage of it, he "transfers an 'interest' in that property (in this case a house) to the mortgagee for the purpose of securing the payment of money advanced etc."; see section 58(*a*) of the Transfer of Property Act. The question now is, what is left with the mortgagor after the transfer of an "interest" in favour of the mortgagee? Is the owner still an "owner" or is he in any way less than an "owner"—a man possessing something short of ownership? If he is still the owner, what he will transfer by way of sale (after the mortgage) will be the house itself and not a mere "interest" or "right" that is left in him.

It is the clearest opinion of jurists that the owner of immovable property, who has parted with some of his rights in the shape of mortgage or lease, remains still the owner. Holland in his "Elements of Jurisprudence," 13th edition, 1924, at p. 209 says: "It (ownership) may . . . . . continue to subsist although stripped of almost every attribute which makes it valuable. . . . . ." Again at p. 223, he says: "One or more of the subordinate elements of ownership, such as a right of possession or user may be granted out, while the residuary right or ownership. . . . . remains unimpaired." The same author, further, at p. 233, talking of

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pledge, says: "Probably the rudest method is that which involves an actual transfer of ownership in the thing from the debtor to the creditor . . . and such is the English mortgage of lands or goods. . . . . except in so far as its theory has been modified by the determination of the court of Chancery and of the legislature to continue, as long as possible, *to regard the mortgagor as the owner of the property.*"

Similarly, Salmond in his "Jurisprudence" (7th edition, 1924), at p. 280, says: "The right of the owner of a thing may be all but eaten up by the dominant rights of lessees, mortgagees and other encumbrancers. His ownership may be reduced to a mere name rather than a reality. Yet, he nonetheless remains the owner of the thing, while all others own nothing more than "rights" over it . . . . He, then, is the owner of a material object, who owns a right to the general or residuary uses of it, after the deduction of all special and limited rights of use vested by way of encumbrance in other persons."

That eminent writer of treatises of law, Pollock, in his "First Book of Jurisprudence" (5th edition, 1923) at pp. 179 and 180, says: "We must not suppose that all the powers of an owner need be exercisable at once or immediately; he may remain owner though he has parted with some of them for a time. He may for a time even part with his *whole* powers of use and enjoyment and suspend his power of disposal, provided that he reserves for himself or his successors the right of ultimately reclaiming the thing and being restored to his power."

Enough has been said to establish, on authority, that the mortgagor, in spite of executing a mortgage, whether it be a simple mortgage or an usufructuary mortgage, is still the owner of the property so mortgaged. If, then, he makes a transfer of "his interest", he makes

a transfer of the property itself and not merely of an abstract right or of "certain rights out of his total bundle of rights" originally owned by him.

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If this were not the case, let us see to what consequences we are landed. A mortgage, as I have pointed out, is, by the very definition, a transfer of an "interest" in a specific immovable property in favour of the mortgagee, irrespective of whether the mortgage is simple or usufructuary. In the case of a simple mortgage the mortgagor retains possession; in the case of a usufructuary mortgage he parts with possession. In either case he is the mortgagor and, one would expect, his interest is the same. We cannot therefore say that in the case of a simple mortgage, the mortgagor being in possession, his interest is a tangible immovable property, while in the case of an usufructuary mortgage the mortgagor's interest is an intangible property, because he is out of possession. Yet, in some cases it has been decided that such is the case. In my opinion, on principle, there can be no distinction made between the two cases of simple and usufructuary mortgages. No authority has been cited to us as to the interest of the mortgagee, but if the cases which deal with the mortgagor's interest have been correctly decided, it would follow that the interest of a simple mortgagee would be an intangible property, while the interest of the usufructuary mortgagee would be a tangible immovable property. As I have already stated, there is no room for this distinction. In each case the mortgagee possesses nothing but an interest in the immovable property and the mortgagor is the owner of the property.

In the case of a mortgage in England, as pointed out by that erudite jurist, Holland (see the quotation from p. 233 above), the mortgagee, from the date of the mortgage, becomes the "legal" owner of the property

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and nothing is left in the mortgagor except what has been called "a bare equity of redemption." The Indian legislature has intentionally refused to import the expression "equity of redemption", and for ample good reasons. It had, however, to use the expression "right to redeem" (see section 60 of the Transfer of Property Act). But the expression has been used in an entirely different sense. A "right to redeem" is not the same thing as "an equity of redemption" in England. In India a host of people, besides the mortgagor himself, are allowed to exercise the right of redemption, see section 91 of the Transfer of Property Act. One of these persons is a judgement-creditor of the mortgagor. Certainly, the interest of a judgement-creditor of the mortgagor and the interest of the mortgagor himself in the property mortgaged are not identical. It would, therefore, be very wrong to substitute the expression "right to redeem" for the English expression of "equity of redemption", and then to say that the "right to redeem" possessed by a mortgagor is an intangible property.

The admissibility of the document in question has to be determined only if the document is one of the description referred to in section 49 of the Registration Act. The Registration Act, section 49, makes documents which are compulsorily registrable under the provisions of section 17 of the Registration Act inadmissible in evidence, for certain purposes. By section 4 of the Transfer of Property Act the provision of section 54 of the same Act has been made "supplemental" to the Registration Act. Under the provisions of section 54 a sale-deed of the value of less than Rs. 100 is compulsorily registrable, it being immaterial whether the property sold is tangible immovable property or intangible property. In the former case, if there be delivery of possession, that may pass title, but then an unregistered sale-deed would be of no use. Section 54, therefore, to

some extent, modifies the provisions of section 17 of the Registration Act. It is therefore argued that section 4 of the Transfer of Property Act should be so read as to embody section 54 into section 17 of the Transfer of Property Act, not only for purposes of amending section 17, but also for purposes of reading section 49 of the Registration Act as applicable to section 54 of the Transfer of Property Act. This contention has been considered by the Courts of Madras and Bombay and different answers have been given. The Full Bench case of *Rama Sahu* v. *Gowro Ratho* (1) decided that section 49 of the Registration Act applied only to the documents mentioned in section 17 of the Registration Act and not to documents which did not come within the purview of the provisions of that section. In my opinion the Madras view is preferable to the view expressed by one of the learned Judges in the case of *Dawal Piranshah* v. *Dharma Rajaram* (2). There can be no doubt that the legislature did mean to incorporate the provisions of the Transfer of Property Act, relating to registration, into section 17 of the Registration Act; but it does not follow that, when framing section 4 of the Transfer of Property Act, they had in their view the provisions of section 49 of the Registration Act. It is no doubt illogical to apply section 49 of the Registration Act to the documents mentioned in section 17 of the same Act and to make the former inapplicable to the documents which are compulsorily registrable under the Transfer of Property Act. But the question is not what the law should be but what the law has been declared to be. A court cannot legislate but can only interpret the law. It will be for the Legislature to remedy the defects that may be pointed out by the courts. By making the provisions of the Transfer of Property Act, relating to registration, supplemental to the Registration Act, the

(1) (1920) I. L. R., 44 Mad., 55. (2) (1917) I. L. R., 41 Bom., 550.

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Legislature simply declared that section 4 of the Transfer of Property Act might be read, say, as "section 17A" of the Registration Act. But something more than this would be necessary for the courts to hold that the Legislature expressed themselves clearly in their intention, if any, that the provisions of section 49 would apply to the said "section 17A" of the Registration Act. I would, therefore, hold that section 49 does not apply to the document of the 28th of February, 1901. Further, it follows that there being no bar to the admissibility in evidence of the document of 1901 (the only bar alleged was section 49 of the Registration Act), the document is admissible in evidence.

Point No. 2.—The contentions of the parties have been set forth above. Ragha Mal was in possession as a mortgagee till the execution of the sale-deed in his favour. His possession was, therefore, permissive and derivative. When Damodar, by execution of the document of 1901, told him that from the date of the execution of the document he (Ragha Mal) became the owner of the property, Ragha Mal's possession ceased to be permissive and derivative. He began, expressly, to claim under a proprietary title, although, as a matter of law, no title as owner accrued to him under the document. There is no room to doubt that the intention of the parties was that from the date of the execution of the document in 1901 Ragha Mal should become the proprietor of the property and Damodar should cease to have anything to do with it. In the circumstances, the possession of Ragha Mal must be, without any difficulty, treated as becoming adverse to Damodar from the date of the execution of the document.

It is, however, contended that on the date of the execution of the sale-deed Damodar was not entitled to possession and that, therefore, from that date Ragha Mal could not begin to start to prescribe for a full estate. It

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is, no doubt, a true proposition of law that you cannot be in adverse possession of a property against a man who is not entitled to the possession of that property. But the present case is exceptional. The mortgagor and the mortgagee, by agreement (if valid), could put an end to the mortgage. They could agree that the mortgage would cease and Damodar would get possession at once. If that had been the agreement, and if, in spite of that agreement, Ragha Mal had continued to be in possession of the property, Ragha Mal's possession would have become adverse, because Damodar would be entitled to possession. Again, the parties could agree that the mortgagee's estate and the mortgagor's estate would vest in the same person. In that case Damodar would cease to have any interest in the property and the possession of Ragha Mal, ceasing to be that of a mortgagee, would start as adverse to Damodar. Where in an intended sale, which can be effected in law only by a registered document, no such document is executed and yet the intending purchaser gets possession, he gets possession with the consent of the intending vendor; but, nonetheless, the purchaser's possession begins adversely to the vendor. If the intending purchaser be fortunate enough to continue, undisturbed by the vendor, in possession for 12 years, he would acquire a perfect title as against the former owner, the vendor. The principle applicable to this case is the same. The fact that the mortgagor, on the 28th of February, 1901, was not entitled to possession does not create any difference, in principle. As I have already stated, the parties by common agreement attempted to put an end to the mortgagee's estate. If the mortgagee's estate could come to an end, the mortgagor would be at once entitled to possession. If the mortgagor does not enter into possession, the mortgagee's possession would become adverse to the

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mortgagor, although the original estate as a mortgagee was not adverse to the mortgagor. As the result of the agreement between Damodar and Ragha Mal, therefore, the possession of Ragha Mal became adverse to Damodar from the date of the execution of the sale-deed, and after the lapse of 12 years neither Damodar nor his successor in title could claim the property.

For the reasons given above, I would answer the second question also in the affirmative.

KENDALL, J. :—I have had the advantage of reading the judgement of my learned brother MUKERJI and I am in agreement with the answers which he has given to the two questions referred to us for decision. In the view that we have taken of the effect of section 4 of the Transfer of Property Act read with sections 17 and 49 of the Registration Act, the document is admissible in evidence for the purpose of showing a change in the character of the possession of the mortgagee. I would observe especially that the wording of section 4 of the Transfer of Property Act shows that the Legislature intended to distinguish the relation of the Transfer of Property Act to the Indian Contract Act, from the relation of the specified sections of the Transfer of Property Act to the Indian Registration Act. The specified sections are not to be "taken as part of" the Indian Registration Act but are merely to be "read as supplemental to" the Registration Act. The result of this distinction must, in my opinion, be that the specified sections of the Transfer of Property Act, viz. 54, paragraphs 2 and 3, 59, 107 and 123, are not to be deemed to be embodied in the Registration Act. They set forth the methods in which sales, mortgages, leases and gifts are to be effected, and as in some cases the transfer may be effected by delivery of property and not by a registered instrument at all, it is clear that these sections could not be embodied in the Registration Act. They do, however,

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provide that certain deeds, which are not compulsorily registrable under the Registration Act, shall be registered, and the effect of section 4, therefore, in making these sections supplemental to the Registration Act is merely to add certain documents to those which must be registered under the Registration Act.

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The effect of this decision is that section 49 of the Registration Act does not affect the deed with which we are concerned in the present appeal, and it is admissible in evidence. It is not necessary for the purposes of the present case to decide the question whether the property which was intended to be transferred by it was "tangible immovable property" or not. But this point was argued at some length, and it was pressed upon us by the learned counsel on behalf of the appellant that the property was tangible. I venture to make some observations on this point, because if it had been necessary for us to decide it I should myself have had some hesitation in following the authority which has been undoubtedly laid down in this Court on the subject. In the case of *Rahmat Ali* v. *Muhammad Mazhar Husain* (1) it has been held by a Bench of this Court that the right to redeem a mortgage comes within the meaning of the expression "other intangible thing" in the second clause of section 54 of the Transfer of Property Act. A similar opinion was expressed by a Bench of the Madras High Court in the case of *Ramasami Pattar* v. *Chinnan Asari* (2), in which it is remarked:—"The equity of redemption in a usufructuary mortgage is only an intangible thing like a reversion . . . . . and it can be transferred by sale only by a registered instrument and not by delivery of the property." This view is supported by a reference to Williams on "Real Property." With all respect to the learned Judges who expressed this opinion, I would

(1) (1913) 11 A. L. J., 407. (2) (1901) I. L. R., 24 Mad., 419

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remark that in English law "what is generally understood by the term mortgage is a *conveyance of land* or other property as security for the payment of money", and the mortgagee has been held to be in law the owner of the mortgaged property.- (See Williams on "Real Property", 24th edition, at p. 653 and the following pages). In section 58 of the Transfer of Property Act, however, a mortgage is defined as "a transfer of an *interest in specific immovable property* for the purpose of securing the payment of money advanced or to be advanced by way of loan . . . . . " In Salmond's Jurisprudence, 6th edition, chapter 12, the author points out that, although strictly nothing can be owned except abstract rights, yet a very common form of speech enables us to speak of the ownership of a material thing, and that (see p. 22) "The ownership of a material thing means the ownership of a *jus in re propriâ* in respect of that thing . . . . . The ownership of a *jus in re alienâ* is always incorporeal, even though the object of that right is a corporeal thing . . . In its full and normal compass a *jus in re propriâ* over a material object is a right to the entirety of the lawful uses of that object. It is a general right of use and disposal, all *jura in re alienâ* being merely special and limited rights derogating from it in special respects. It is only this absolute and comprehensive right—this *universum jus*—that is identified with its object . . . . . This compass, however, may be limited to any extent by the adverse influences of *jura in re alienâ* vested in other persons. The right of the owner of a thing may be all but eaten up by the dominant rights of lessees, mortgagees, and other incumbrancers. His ownership may be reduced to a mere name rather than a reality. Yet he nonetheless remains the owner of the thing, while all the others own nothing more than rights over it." Bearing in mind these principles of jurisprudence, I find great

difficulty in persuading myself that a mortgagor, when he executes a mortage and "transfers an interest" in a house or land or other tangible property of his own, transfers the *universum jus* in that property. It appears to me that it is just this which the mortgagor retains, whether he executes a simple or a usufructuary mortgage, in any territory to which the Transfer of Property Act applies. It must follow, then, that in selling what is popularly called his "equity of redemption" he is in reality selling the property itself, and in the present case this was undoubtedly tangible property. It would follow from this that he could sell it by placing the buyer in possession of the property (provided that the property was of less value than Rs. 100) without executing a registered instrument.

I am entirely in agreement with my learned brother that there was no delivery of possession in the present case. It is true there is more than one decision of the Madras High Court which would support an opposite view. But we have the authority of the Calcutta High Court that there must be actual and not constructive delivery of possession, and, as my learned brother has pointed out, the reason for this is that there must be publicity of the fact that title has passed. In spite, therefore, of the fact that when the mortgagor executed this deed in 1901 his intention was to transfer what, in my opinion, was tangible immovable property, nevertheless, as he actually did not deliver possession to the mortgagee in his new capacity of owner and there was no registered deed, the transfer was not valid.

We have held the document to be admissible in evidence to prove the intention of the parties, that is to say, that Ragha Mal, who had hitherto been a mortgagee in possession, should become the full proprietor. It is true that their Lordships of the Privy Council have held that possession is never considered

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adverse if it can be referred to a lawful title, and it may therefore be argued that if Ragha Mal's position had ever been called in question before his death, it would have been necessary to hold that his possession was that of a mortgagee and not of a trespasser. In the case of *Corea* v. *Appuhamy* (1), however, in which the above proposition is quoted with approval, their Lordships have remarked that, even where such a lawful title existed, possession might be held to be adverse if there were a definite statement of ouster in the first place. I do not think that in the present case there can be any difficulty in regarding the unregistered sale-deed as a definite statement of ouster as between the parties to it, for it clearly sets forth that from the date of the deed Ragha Mal is to be the owner. It is true that we have held that there was no actual delivery of possession such as would transfer tangible property under section 54 of the Transfer of Property Act. It might therefore be difficult, if not impossible, to hold that the possession of Ragha Mal became from that moment adverse to the whole world, or indeed to anyone else except the other party to the document against whom the statement of ouster had effect. But as regards Damodar himself I believe that the document is sufficient to change the nature of Ragha Mal's possession from that of a mortgagee to that of a trespasser, as the deed is held to be insufficient to effect a valid transfer. If Damodar had died before Ragha Mal's title had matured by 12 years' adverse possession against him into that of a full owner, it might have been very difficult to hold that the possession of Ragha Mal continued to be adverse to Damodar's heirs. But this point does not arise, because Damodar did not die until 1914, and before that Ragha Mal had

(1) [1912] A. C., 230.

completed 12 years' possession since the nature of his possession had changed.

I agree therefore in holding that the plaintiffs' suit was barred by limitation, and that the appeal ought to allowed.

SULAIMAN, A.C.J. :—I agree with my learned brothers in their answers to the questions referred, and would only add a few words.

The first question is whether the interest of the mortgagor in a property usufructuarily mortgaged is tangible or intangible immovable property. There is no doubt that the ownership in the property remains vested in the mortgagor, however heavily the property may be mortgaged. But in a case of usufructuary mortgage, as distinct from a simple mortgage, the mortgagor has no right to immediate enjoyment of the profits of the property. His right is to redeem it, that is to say to recover possession on payment of the mortgage money. According to its literal meaning, "tangible" property would be one which is capable of being touched, and therefore capable of being possessed. It must accordingly be property which is capable of delivery of possession from one person to another. A mortgaged property itself is undoubtedly "tangible," but the interest of the mortgagor in the property, when the mortgage is usufructuary, is not identical with the property itself, as some interest has already passed to the mortgagee, including the right to remain in possession and appropriate the profits. The interest which the mortgagor possesses is not itself capable of being touched, nor is it such that an actual delivery of its possession can be effected by the mortgagor to the mortgagee. It seems difficult to conceive of a thing as being tangible when it is not capable of actual

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delivery of possession. Although, therefore, the mortgagor is the legal owner of the usufructuarily mortgaged property, whatever rights he possesses, so long as the mortgage subsists, cannot be treated as "tangible." The subject-matter of ownership is "tangible," but the interest which the mortgagor can transfer is "intangible."

No case has been cited before us where it has ever been suggested that the interest of a mortgagor in the case of a usufructuary mortgage is "tangible" immovable property. On the other hand there are numerous authorities to the effect that such an interest is "intangible." I may refer to the following cases:—*Rahmat Ali* v. *Muhammad Mazhar Husain* (1), *Ramasami Pattar* v. *Chinnan Asari* (2), *Mahendra Bahadur Singh* v. *Chandrapal Singh* (3) and *Sheikh Hushmat* v. *Sheikh Jamir* (4). Nothing has been brought to my notice in argument which would justify me in dissenting from such a consensus of view.

The second point is whether, even if the interest were "tangible" immovable property, constructive delivery of possession would be sufficient to bring it within section 54 of the Transfer of Property Act.

I agree with the Calcutta view that delivery is the essence of the transaction and must be of a nature capable of being proved in case of dispute. There cannot be delivery of a property by the mortgagor to the mortgagee when the property is already in the possession of the latter. A surrender of the right to redeem, or a transfer of the legal ownership, is not by any means the same thing as the delivery of the property itself. Thus the registration of the sale-deed in question was compulsory.

(1) (1913) 11 A. L. J., 407 (409-10). (2) (1901) I. L. R., 24 Mad., 442 (463).
(3) (1920) 24 Oudh Cases, 155. (4) (1918) 52 Indian Cases, 558.

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The third point is whether for want of registration the sale-deed was inadmissible in evidence under section 49 of the Registration Act. Its registration was compulsory under section 54 of the Transfer of Property Act. Section 4 of the Transfer of Property Act provides that section 54, paragraph 2, "shall be read as supplemental to the Indian Registration Act of 1877." The chapter and sections of the Act which relate to contracts are to be taken "as part of" the Indian Contract Act. But section 54, paragraph 2, is "supplemental" to the Registration Act. Even if it was the intention of the Legislature to incorporate this provision of the Transfer of Property Act into section 17 of the Registration Act, the language used falls short of carrying that into effect. There is no justification for holding that the provisions of section 54 are not only "supplemental" to the Registration Act, but a "part and parcel" of a particular section of that Act. It follows that the reference in section 49 of the Registration Act to section 17 cannot be deemed to be applicable to the provisions of section 54 of the Transfer of Property Act. However illogical it may look, I am constrained to hold that section 49 does not make the document inadmissible in evidence. I prefer the view expressed by MACLEOD, J., in the case of *Dawal Piranshah* v. *Dharma Rajaram* (1) and followed in the case of *Rama Sahu* v. *Gowro Ratho* (2).

Even if section 49 were applicable, the document cannot be received as evidence of any *transaction affecting immovable property*. It is inadmissible for the purpose of showing that a transfer was effected, but there is no prohibition against its use for the collateral purpose of showing the nature or character of possession. If instead of the word "affecting",

(1) (1917) I. L. R., 41 Bom., 550. (2) (1920) I. L. R., 44 Mad., 55.

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the words "purporting to affect" had been used, the conclusion might have been different; but as the section stands, an attempt to show the nature of possession is not giving evidence of a "transaction" of transfer. Proof of possession is not proof of the transaction of sale.

On this point the authorities are overwhelming. I may only refer to the cases of our own High Court:—*Jhamplu* v. *Kutramani* (1) and other cases cited hereafter.

The last question is whether in spite of the ineffectual sale the mortgagee has acquired adverse possession over the property. This point is not free from difficulty. If we consider the position of the mortgagee a day after the unregistered sale-deed, it must be conceded that the mortgage was not then extinguished but was still subsisting. Under the mortgage-deed, the mortgagee was entitled to retain possession as mortgagee. The mortgagor's only remedy was to redeem the property by suing for redemption. If the mortgagor had brought such a suit soon after, it could not have been a suit for possession as against a trespasser. It was bound to be a suit for redemption. Such a suit would have been governed by article 148 and not article 142 or article 144 of the Limitation Act. This being the true position then, could it be altered by a mere lapse of 12 years? When the mortgagor's right was to recover possession only on payment of the mortgage money, for which he had 60 years to wait, could his right be extinguished because he could not pay the amount within 12 years?

In the case of *Thomas* v. *Thomas* (2), WOOD, V. C., recognized the principle that possession is

(1) (1917) I. L. R., 39 All., 696. (2) (1855) 2 Kay and Johnson, 79.

never considered adversed if it can be referred to a lawful title, and approved of a previous authority ghére a party, who had taken possession of copyholds on the death of his wife by an adverse title, lived more than 20 years afterwards, and it was then found that there was an old custom of the manor by which he had a right to courtesy, and therefore his possession was referred to that title which was consistent with the title of the other party.

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In the case of *Corea* v. *Appuhamy* (1) their Lordships of the Privy Council approved of the priciple that possession is *never* considered adverse if it *can* be referred to a lawful title.

In the case of *Khiaraj Mal* v. *Daim* (2), their Lordships of the Privy Council remarked that as between the mortgagor and mortgagee "neither exclusive possession by the mortgagee for any length of time short of the statutory period of 60 years, nor acquiescence by the mortgagor not amounting to a release of the equity of redemption, will be a bar or a defence to a suit for redemption if the parties are otherwise entitled to redeem."

But these observations of their Lordships must be considered with reference to the facts of those cases. I do not think that their meaning can be stretched so as to lay down that a person who has a legal right to retain possession of the property can never acquire adverse possession as against the owner. If such were the law, then it would be absolutely impossible for a co-sharer, who has the legal right to retain possession, to acquire adverse possession against a co-sharer. The case of *Corea* v. *Appuhamy* (1) itself shows that "an ouster or something equivalent

(1) (1912) A. C., 230 (236).

(2) (1904) I. L. R., 32 Calc., 296 (312).

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to ouster can put an end to possession which in law is deemed to be the possession of his co-owners also." What the dicta quoted above mean is that a mortgagee or a co-sharer cannot by his own act, however clear and unambiguous, alter the character of his own possession. As their Lordships put it in *Corea* v. *Appuhamy*: "It was not possible for him to put an end to that possession by any secret intention in his mind." Mere exclusive possession would not be sufficient to raise "the presumption of ouster."

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The case, however, is different where a change in the character of the possession is brought about by an agreement between the parties or with their express consent, as distinguished from a mere acquiescence. I do not see why, if both parties agree and intend that from a particular date the possession of the mortgagee over the property should cease to be that of a mortgagee and be adverse as against the mortgagor, such a change cannot be recognized or be effectual. As a result of the act of both the parties, a person may have adverse possession even though he also has a legal title as a co-sharer or mortgagee.

I am, therefore, of opinion that there is nothing in the observations of their Lordships of the Privy Council which preclude our holding that a change in the character of the mortgagee's possession was brought about and it had become adverse to the mortgagor, though the mortgage itself was not in the eye of the law extinguished.

There is plenty of authority in support of this view. *Lalman Pande* v. *Sheo Narain Pande* (1), *Mahendra Bahadur Singh* v. *Chandrapal Singh* (2), and *Khedu Rai* v. *Sheo Parson Rai* (3).

(1) (1918) 17 A. L. J., 737. (2) (1920) 24 Oudh Cases, 155.
(3) (1917) I. L. R., 39 All., 123.

The facts of all these three cases were similar to the facts before us, and the courts held that the right of redemption was extinguished after a lapse of 12 years

I would accordingly answer both the questions in the affirmative.

BY THE COURT.—The answer to both the questions are in the affirmative.

The original Bench (SULAIMAN, A. C. J. and KENDALL, J.), allowed the appeal, set aside the decrees of the courts below and dismissed the plaintiffs' suit with costs in all courts.

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ACTS—1860—XLV (INDIAN PENAL CODE, SECTION 153A, *See* Criminal Procedure Code, section 108 854

ACTS—1860—XLV (INDIAN PENAL CODE), SECTION 172, *See* Criminal Procedure Code, sections 118, 121 and 514 666

ACTS—1860—XLV (INDIAN PENAL CODE), SECTION 194—"*Causing a circumstance to exist*"—*Bringing tutored evidence before a court—Charge translated into Urdu and read out to jury by Government pleader—Procedure.*] *Held* that a person who brings before a court a witness whom he has tutored to tell a false story concerning the case before it, may properly be convicted under section 194 of the Indian Penal Code. *Emperor* v. *Cheda Lal*, I. L. R., 29 All., 351, and *Durga Prasad* v. *Emperor*, 30 Indian Cases, 651, referred to.

A Sessions Judge having a rather complicated charge to deliver to a jury, and not feeling quite sure that he had sufficient Urdu to be able to make himself perfectly intelligible to them, wrote out his charge in English and then got the Government Pleader to translate it and read it to the jury. *Held* that this procedure was not illegal.

Emperor *v.* Sur Nath Bhaduri, I. L. R., 50 All., ... 365

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ACTS—1860—XLV (INDIAN PENAL CODE), SECTION 215—*Essential ingredients of the offence defined.*] The primary aim of section 215 of the Indian Penal Code is to punish all trafficking in crime by which a person, knowing that property has been obtained by crime, and knowing the criminal, makes a profit out of the crime, while screening the offender from justice.

Where a man undertook to attempt to recover certain horses which were believed to have been stolen, and took money for so doing; but there was no evidence to show that he had any knowledge of who the thief was, or that he was making any attempt to screen the thief from justice, or that he failed to use all means in his power to cause the offender to be apprehended, it was *held* that he could not rightly be convicted of the offence defined in section 215.

Emperor *v.* Mangu, I. L. R., 50 All. 186

ACTS—1860—XLV (INDIAN PENAL CODE) SECTION 447—*Criminal trespass—Essential ingredients of offence.*] It is essential to the validity of a conviction of the offence of criminal trespass that the court should find the offence to have been committed with one or other of the intentions named in section 447 of the Indian Penal Code, viz., either to commit an offence or to intimidate, insult or annoy the party in possession. *Emperor* v. *Jangi Singh*, I. L. R., 26 All., 194, followed. *Ghasi* v. *Emperor*, 15 A. L. J., 793, referred to.

Emperor *v.* Mathura Rai, I. L. R., 50 All. 637

ACTS—1860—XLV (INDIAN PENAL CODE), SECTION 500, *See* Act No. XXV of 1867, section 7 806

ACTS—1867—III (PUBLIC GAMBLING ACT), SECTIONS 3 AND 4—*Accused charged under different sections, but offences committed in the course of the same transaction—Joint trial—Criminal Procedure Code, section* 239 (*d*).] There is nothing to prevent persons charged with offences under sections 3 and 4 of the Public Gambling Act, 1867, being tried jointly with persons charged only with offences under section 4, provided that all the offences were committed in the course of the same transaction. *Makhan* v. *Emperor*, 5 Indian Cases, 720, and *Emperor* v. *Fazal Din*, 27 Indian Cases, 844, dissented from.

Emperor *v.* Darab, I. L. R., 50 All. 412

ACTS—1867—XXV (PRESS AND REGISTRATION OF BOOKS ACT), SECTION 7—*Newspaper—"Declared printer"—Responsibility of printer for defamatory matter printed in a newspaper—Act No. XLV of* 1860 (*Indian Penal Code*), *section* 500.] *Primâ facie* the person who is the "declared printer" of a newspaper is responsible for everything that is printed in it. He can, however, escape liability by showing that he was absent *bonâ fide*, that is, not with the purpose of evading responsibility, when a particular article complained of was printed. But if he does so, he is bound to give evidence as to who the actual printer of the paper in his absence was. *Emperor* v. *Phanendra Nath Mitter*, I. L. R., 35 Calc., 945, followed.

Emperor *v.* Muhammad Siraj, I. L. R., 50 All. ... 806

ACTS—1870—VII (COURT FEES ACT), SECTION 4.—*Civil Procedure Code section* 149—*Memorandum of appeal presented on an insufficient stamp—Procedure.*] A court is not bound to accept a memorandum of appeal when it has been brought to its notice that the memorandum is insufficiently stamped. The concession contemplated by section 149 of the Code of Civil Procedure cannot be claimed as of right. *Ram Sahay Ram Pande* v. *Kumar Lachmi*

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Narayan Singh, 3 Pat. L. J., 74, *Lekh Ram* v. *Ramji Das*, I. L. R., 1 Lah., 234, and *Akkaraju Narayana* v. *Akkaraju Seshamma*, 27 M. L. J., 677, referred to. *Achut Ramchandra Pai* v. *Nagappa Bab Balgya*, I. L. R., 38 Bom., 41, dissented from.

No doubt, if an insufficiently stamped memorandum of appeal is accepted by inadvertence, time may be given to the appellant to supply the deficiency. But if the court is aware *ab initio* of the insufficiency of the stamp, it ought to return the memorandum to the appellant in order that he may, if the case admits, represent it properly stamped and apply for an extension of time under section 5 of the Indian Limitation Act, 1908, *Jai Singh Gir* v. *Sita Ram Singh*, 21 A. L. J., 333, referred to.

Brijbhukhan *v.* Tota Ram, I. L. R., 50 All. ... 980

ACTS—1870—VII (COURT FEES ACT), SECTION 7, CLAUSE (*iv*) (*c*)—*Act No. VII of* 1887 (*Suits Valuation Act*), *section* 8—*Court fee—Suit for a declaration of plaintiff's title and for possession.*] If a plaintiff elects to ask in his plaint for a declaration of his title as well as for possession of certain property, when he need only have sued for possession *simpliciter*, he will have to pay court fees as on a suit for a declaration with consequential relief, unless the court allows him to amend his plaint by striking out the prayer for a declaration. So *held*, where the plaintiff had prayed (*a*) for a declaration that a mortgage executed by his co-parcener and a decree for foreclosure obtained thereon were void and ineffectual, and (*b*) for possession. *Ganga Dei* v. *Sukhdeo Prasad*, I. L. R., 47 All., 78, followed. *Tika Ram* v. *Salig Ram*, 57 Indian Cases, 494, dissented from.

Tula Ram *v.* Dwarka Das, I. L. R., 50 All. ... 610

ACTS—1872—I (INDIAN EVIDENCE ACT), SECTIONS 11 AND 13, *See* Criminal Procedure Code, sections 99A, 99B, and 251 ... 157

ACTS—1872—I (INDIAN EVIDENCE ACT), SECTIONS 32(5)—*Evidence—Statements made post litem motam—Meaning of the expression "before the dispute arose."*] The expression "before the question in dispute was raised", as used in section 32, clause (5) of the Indian Evidence Act, 1872, does not necessarily mean simply before a suit has been filed, but before the dispute which afterwards culminates in a suit has arisen. *Kalka Prasad* v. *Mathura Prasad*, I. L. R., 30 All., 510, followed. *Bahadur Singh* v. *Mohar Singh*, I. L. R., 24 All., 91, and *Mauladad Khan* v. *Abdul Sattar*, 15 A. L. J., 349, referred to.

Rup Kishor *v.* Patrani, I. L. R., 50 All. 152

ACTS—1872—I (INDIAN EVIDENCE ACT), SECTION 33—*Witness—Effect of death of witness before cross-examination is complete.*] If a witness under examination by a court dies before his cross-examination is completed, no part of his evidence can be made use of. *Boisagomoff* v. *The Nahapiet Jute Company*, 5 C. W. N., (Notes), p. ccxxx, followed.

Narsingh Das *v.* Gokul Prasad, I. L. R., 50 All. ... 113

ACTS—1872—I (INDIAN EVIDENCE ACT), SECTION 92—*Evidence—Admissibility of evidence to show that two ostensible sales were in reality one transaction of exchange—Pre-emption.*] *Held* (1) that evidence is admissible to show that two documents which on the face of them were two separate sale-deeds were really intended to carry out one transaction, namely, an exchange, and (2) that, this being the case, no suit for pre-emption could lie. *Hanif-un-nissa* v. *Faiz-un-nissa*, I. L. R., 33 All., 340, referred to.

Kishan Lal *v.* Ram Lal, I. L. R., 50 All. 59

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ACTS—1872—I (INDIAN EVIDENCE ACT), SECTION 92, PROVISO (3), *See* Act No. XXVI of 1881, section 46 754

ACTS—1872—I (INDIAN EVIDENCE ACT), SECTION 114—*Presumption—Civil Procedure Code, section 100—Second Appeal—Failure of court of first appeal to invoke a presumption of fact.*] In a suit for a declaration that a certain sale-deed ostensibly executed by *D* was forged, fraudulent and fictitious, it was found that the deed was as a matter of fact signed by *D*, by placing his thumb-impression on it. No evidence was led by the plaintiff to prove that the thumb-impression had been obtained in any manner which might render it invalid.

Held, that, in the absence of any such evidence, the court was bound to draw the inference that the deed was properly executed, and, as this was an inference of the kind illustrated in section 114 of the Indian Evidence Act, 1872, the failure to draw it was sufficient to support a second appeal. *Rance Surnomoyee* v. *Luchmeput Doogur*, 9 W. R., C. R., 338, and *Nilatatchi* v. *Venkatachala Mudali*, 1 Mad. H. C. R., 134, referred to.

Sita Ram *v.* Nanku, I. L. R., 50 All. 115

ACTS—1872—I (INDIAN EVIDENCE ACT), SECTION 115, *See* Act No. IX of 1872, section 11 862

ACTS—1872—I (INDIAN EVIDENCE ACT), SECTIONS 145 AND 155, *See* Criminal Procedure Code, section 164 242

ACTS—1872—IX (INDIAN CONTRACT ACT), SECTION 11—*Act No. I of 1872 (Indian Evidence Act), section 115—Contract entered into with an infant representing himself to be of full age—Estoppel—Equitable relief.*] Where a suit is brought upon a contract entered into with an infant on the strength of a representation made by the infant that he is of full age, the defendant will not be estopped from pleading his minority; but, *semble*, upon equitable grounds he might be made liable for any loss which the plaintiff might have suffered in carrying out the contract entered into with him.

Radha Kishan *v.* Bhore Lal, I. L. R., 50 All. ... 862

ACTS—1872—IX (INDIAN CONTRACT ACT), SECTIONS 23 AND 30—*Principal and agent—Wagering contract—Suit between principal and agent.*] In the United Provinces a claim by a principal against an agent or by an agent against his principal arising out of a contract is not affected by the circumstance that, as between the principal and the other party to the contract, it may be a wagering transaction. *Sobhagmal Gianmal* v. *Mukunchand Balia*, I. L. R., 51 Bom., 1, and *Hardeo Das, Nanak Chand* v. *Ram Prasad, Shyam Sundar*, I. L. R., 49 All., 438, referred to.

Ram Prasad, Shiam Sundar Lal *v.* Ramji Lal, I. L. R., 50 All. 115

ACTS—1872—IX (INDIAN CONTRACT ACT), SECTION 69, *See* Act No. IV of 1882, section 55 (1) (*g*) 371

ACTS—1872—IX (INDIAN CONTRACT ACT), SECTION 69, *See* Act No. IX of 1887, schedule II, article 42 438

ACTS—1872—IX (INDIAN CONTRACT ACT), SECTIONS 72 AND 73—*Obligation resembling contract—Compensation due under the Land Acquisition Act, 1894, paid by mistake to the wrong person—Duty of person receiving such payment to refund—Interest.*] Certain compensation which would have been due to one *B* under the provisions of the Land Acquisition Act, 1894, had he survived, was paid by mistake to *AK* on the supposition that he was the legal representative of *B*. It was afterwards found that *AK* was not the legal representative of *B*, but that one *LC* was.

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Held that sections 72 and 73 of the Indian Contract Act applied. *AK* was bound to refund to *LC* the money paid to him by mistake, and, as he had for a considerable period avoided payment thereof, he was properly chargeable with interest for the time during which the money had been withheld.

Held, also, that illustration (*n*) to section 73 of the Indian Contract Act, 1872, is not exhaustive and cannot be considered as co-extensive with the provisions of the section itself. *Jwala Prasad* v. *Hoti Lal*, I. L. R., 46 All., 625, and *Abdul Shaffu Rowther* v. *Hamida Bivi Ammal*, I. L. R., 42 Mad., 661, referred to.

Anrudh Kumar *v.* Lachhmi Chand, I. L. R., 50 All. ... 818

ACTS—1872—IX (INDIAN CONTRACT ACT), SECTIONS 73, 77, 87 AND 88—*Sale—Earnest money—Failure of seller to make delivery—Right to recovery of earnest money.*] Although there is no specific provision in the Indian Contract Act relating to the refund of money paid as earnest-money or part payment, where such a payment is made on a contract for the sale of goods to be delivered at a later date and the seller does not make delivery, the buyer is entitled to recover the money so paid.

Piari Lal *v.* Mina Mal, Balkishan Das, I. L. R., 50 All. 82

ACTS—1872—IX (INDIAN CONTRACT ACT), SECTION 78—*Shares—Agreement to sell so many shares in a particular company—"Unascertained goods"—Act No. VII of* 1913 *(Indian Companies Act), sections* 18 *and* 28—*Breach of agreement to transfer shares—Measure of damages.*] "Goods" as defined in the Indian Contract Act, 1872, comprise every kind of movable property, including shares in a company. Where, therefore, a person agrees to sell so many shares in a company without specifying the numbers of the share certificates, the agreement is merely an agreement to sell unascertained goods and passes no interest in any shares owned by the vendor until such shares are definitely ascertained.

An agreement for the sale of shares does not imply a further agreement to have the transferee's name registered as the holder.

In the event of the proposed transferee refusing to complete such an agreement by the purchase of the stipulated number of shares, the measure of damages would be the difference between the contract price and the market price at the time when the breach took place; but it would be the duty of the transferor to mitigate the loss consequent upon the breach. *Jamil* v. *Moolla Dawood Sons and Co.*, I. L. R., 43 Calc., 493, *Maneckji Pestonji Bharucha* v. *Wadilal Sarabhai and Co.*, I. L. R., 50 Bom., 360, *London Founders Association* v. *Clarke*, L. R., 20 Q. B. D., 576, *Muir Mills Co. Ltd., of Cawnpore* v. *T. H. Condon*, I. L. R., 22 All., 410, *Bahadur Singh* v. *Shiam Sundar Tug*, I. L. R., 36 All., 365, and *Nanney* v. *Morgan*, 37 Ch. Div., 346, referred to.

Domingo *v.* DeSouza, I. L. R., 50 All. 695

ACTS—1872—IX (INDIAN CONTRACT ACT), SECTIONS 108 AND 178, *See* Railway receipt 227

ACTS—1872—IX (INDIAN CONTRACT ACT), SECTION 134—*Principal and surety—Remedy of creditor against principal debtor allowed to become time-barred—Discharge of surety—Appeal—Operation of decree not suspended by the filing of an appeal.*] If a creditor allows his remedy against the principal debtor to become barred by time, the legal consequence of this is that the principal debtor is discharged within the meaning of section 134 of the Indian Contract Act, 1872, and the creditor can no longer proceed against the surety. *Hazari* v. *Chunni Lal*, I. L. R., 8 All., 259, *Radha*

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v. *Kinlock*, I. L. R., 11 All., 310, and *Ranjit Singh* v. *Naubat*, I. L. R., 24 All., 504, referred to.

Held also that under the Indian law and procedure an original decree is not suspended by presentation of an appeal nor is its operation interrupted when the decree is one of dismissal, and the cause of action arises on the passing of the first court's decree and is not suspended till that decree is finally affirmed on appeal. *Juscurn Boid* v. *Pirthichand Lal Choudhury*, I. L. R., 46 Calc., 670, followed.

Salig Ram Misir v. Lachhman Das, I. L. R., 50 All. ... 211

ACTS—1872—IX (INDIAN CONTRACT ACT), SECTIONS 151, 152 AND 160. *See* Act No. IX of 1890, section 76 246

ACTS—1872—IX (INDIAN CONTRACT ACT), SECTION 247, *See* Hindu law 776

ACTS—1872—IX (INDIAN CONTRACT ACT), SECTION 251—*Act No. IX of* 1908 (*Indian Limitation Act*), *sections* 19, 20 *and* 21—*Partnership—Joint Hindu family—Acknowledgment.*]. When a joint Hindu family carries on a business, the members thereof are in the position of partners as regards persons dealing with that business.

An acknowledgement, therefore, made by one member of the family, of a debt due by the family in the course of its family business, can be availed of by the creditor as against the entire family. *Gadu Bibi* v. *Parsotam*, I. L. R., 10 All., 418, followed *Lalta Prasad* v. *Babu Prasad*, I. L. R., 32 All., 51, distinguished.

Debi Dayal v. Baldeo Prasad, I. L. R., 50 All. ... 982

ACTS—1877—I (SPECIFIC RELIEF ACT), SECTION 9, *See* Muhammadan law 86

ACTS—1877—I (SPECIFIC RELIEF ACT), SECTION 42, *See* Hindu law ... 678

ACTS—1879—XVIII (Legal Practitioners Act), section 28, *See* Civil Procedure Code, sections 11, 96 and 100; order XLI, rule 36 ... 517

ACTS—1881—VI (PROBATE AND ADMINISTRATION ACT), SECTION 3—*Will—Probate—Application to admit to probate a draft will neither signed nor attested.*] Draft instructions given by a testator to a lawyer, or a draft will prepared on such instructions can be treated as a will so as to allow grant of probate.

Aulia Bibi v. *Ala-ud-din*, I. L. R., 28 All., 715, *Janki* v. *Kallu Mal*, I. L. R., 31 All., 236, and *Surabai Amibai* v. *Mahomed Cassum*, I. L. R., 43 Bom., 641, followed.

Balmakund v. Ramendra Nath Ghose, I. L. R., 50 All. 314

ACTS—1881—XXVI (NEGOTIABLE INSTRUMENTS ACT), SECTIONS 9 AND 59—*Suit by endorsee against drawer of a cheque—"Holder in due course."*] A cheque is payable on demand and the amount becomes payable when the cheque is presented for payment to the drawee.

Where the plaintiff, on the 28th of September, took a cheque which had been drawn on the 5th of June, in good faith, for consideration, without notice of its having been dishonoured and without having any reason to believe that there was any defect in the title of his transferor and it was found that the transferor was not a holder for value, the endorsement to him being fictitious, it was *held*, that the plaintiff was not a "holder in due course" and therefore his claim against the drawer must fail.

Ram Sarup v. Hardeo Prasad, I. L. R., 50 All. ... 309

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ACTS—1881—XXVI (NEGOTIABLE INSTRUMENTS ACT), SECTION 46—*Act No. I of* 1872 (*Indian Evidence Act*), *section* 92, *proviso* (3) —*Promissory note—Suit on note—Defendant entitled to give evidence of collateral agreement delaying payment of note.*] There is nothing in law to debar the maker of a promissory note from pleading as a defence to a suit thereon that as a matter of fact the note was given for a special purpose and was not payable until the happening of a certain specific event which, so far, had not yet happened.

Sheo Prasad, Ram Prasad v. *Gobind Prasad*, I. L. R., 49 All., 464, followed. *Sri Ram* v. *Sobha Ram, Gopal Rai*, I. L. R., 44 All., 521, dissented from.

Bhogi Ram *v.* Kishori Lal, I. L. R., 50 All. ... 754

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTIONS 4 *and* 54—*Act No. XVI of* 1908 (*Indian Registration Act*), *sections* 17 *and* 49—*Usufructuary mortgage—Sale by unregistered deed of mortgagor's interest to mortgagee—Adverse possession—Registration.*] The predecessor in interest of one *D*, in 1873, mortgaged a house to *RM*, the mortgage being usufructuary. In 1901 *D* sold the house to *RM*, for Rs. 90. A sale-deed was executed but was never registered. In 1919 (*D* having died in 1914) *D's* heir sold the same house to *ML* and others.

Held, on suit by the second purchasers for redemption that, although the unregistered sale-deed of 1901 was of no avail to pass title, and there could be no delivery of possession, inasmuch as the mortgagee had been in possession all along, yet the deed was available as evidence of a change in the nature of the mortgagee's possession, and, that being so, the possession of the mortgagee must be counted as adverse from the date of its execution. The mortgagor's heir had, therefore, in the year 1919, no title which he could transfer, and the plaintiffs' suit must fail.

The effect of section 4 of the Transfer of Property Act is not to make section 49 of the Registration Act applicable to documents which are compulsorily registrable by the provisions of section 54, paragraph 2, of the Transfer of Property Act and not by the provisions of section 17 of the Registration Act itself.

Per MUKERJI and KENDALL, JJ. (SULAIMAN, A. C. J., dissenting):—The sale by a mortgagor of his interest in property of which he has made a usufructuary mortgage is a sale of "tangible immovable property."

The following cases were referred to:—*Sibendrapada Banerjee* v. *Secretary of State for India in Council*, I. L. R., 34 Cal., 207, *Muthukaruppan Samban* v. *Muthu Samban*, I. L. R., 38 Mad., 1158, *Rama Sahu* v. *Gowro Ratho*, I. L. R., 44 Mad., 55, *Dawal Piranshah* v. *Dharma Rajaram* I. L. R., 41 Bom., 550, *Rahmat Ali* v. *Muhammad Mazhar Husain*, 11 A. L. J., 407, *Ramasami Pattar* v. *Chinnan Asari*, I. L. R., 24 Mad., 449, *Corea* v. *Appuhamy* [1912] A. C., 230, *Mahendra Bahadur Singh* v. *Chandrapal Singh*, 24 Oudh Cases, 155, *Sheikh Hushmat* v. *Sheikh Jamir*, 52 Indian Cases, 558, *Jhamplu* v. *Kutramani*, I. L. R., 39 All., 696, *Thomas* v. *Thomas*, 2 Kay and Johnson, 79, *Khiaraj Mal* v. *Daim*, I. L. R., 32 Calc., 296, *Lalman Pande* v. *Sheo Narain Pande*, 17 A. L. J., 737 and *Khedu Rai* v. *Sheo Parson Rai*, I. L. R., 39 All., 423.

Sohan Lal *v.* Mohan Lal, I. L. R., 50 All., ... 986

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTIONS 4 AND 137, *See* Railway receipt 227

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ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 6—*Offerings at a temple—Right to receive, transferable—"Property"—"Mere possibility."*] Although the right to receive the emoluments attached to a priestly office is not, in the absence of a custom or usage to the contrary, ordinarily transferable, when the right to receive offerings made at a temple is independent of an obligation to render services involving qualifications of a personal nature, such as officiating at the worship, there is no justification for holding that such a right is not transferable. *Mancharam* v. *Pranshankar*, I. L. R., 6 Bom., 298, *Rajah Vurmah Valia* v. *Ravi Vurmah Mutha*, 4 I. A., 76, *Durga Bibi* v. *Chanchal Ram*, I. L. R., 4 All., 81, and *Srimati Mallika Dasi* v. *Ratanmani Chakarvarti*, 1 C. W. N., 493, referred to. *Pragi* v. *Gauri Shankar*, 51 Indian Cases, 86, distinguished. *Pancha Thakur* v. *Bindeswari Thakur*, I. L. R., 43 Calc., 28, and *Sukh Lal* v. *Bishambhar*, I. L. R., 39 All., 196, dissented from. *Ahmad-uddin* v. *Ilahi Bakhsh*, I. L. R., 34 All., 465, followed.

Balmukand *v.* Tula Ram, I. L. R., 50 All. 394

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTIONS 28, 30, *See* Hindu law 375

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTIONS 83 AND 84—*Mortgage—Redemption—Deposit of mortgage money in court—Conditions necessary for an effective deposit—Dispute as to minority of mortgagee.*] In order that the consequences attached by section 84 of the Transfer of Property Act, 1882, to a tender made under section 83 of the same should ensue, it is necessary that the mortgage money should be deposited to the credit of the real mortgagee, and of him alone. Hence, where the mortgagee was a person in whose family the custom of primogeniture prevailed, and he died leaving him surviving two sons, it was *held* that a deposit of the mortgage money to the credit of both the sons was not a valid deposit within the purview of section 83. *Debendra Mohan Rai* v. *Sona Kunwar*, I. L. R., 26 All., 291, and *Madhavi Amma* v. *Kunhi Pathumma*, I. L. R, 23 Mad., 510, followed. *Ram Sunran* v. *Sahibzada Bijai Partab Narain Singh*, Weekly Notes, 1885, p. 328, distinguished.

If, upon a deposit being made, a question arises as to the majority or minority of the person in whose favour the money is deposited, the question must be decided by the court and a guardian *ad litem* appointed, if necessary. *Ruckmani* v. *Veerasami*, 47 M. L. J., 370, *Kannu Mal* v. *Indarpal Singh*, I. L. R., 45 All., 273, *Pandurang* v. *Mahadaji*, I. L. R., 27 Bom., 23, and *Gokul Kalwar* v. *Chandar Sekhar*, I. L. R., 48 All., 611, referred to.

Ganeshji Lal *v.* Rohni Rukumdhuj Prasad Singh, I. L. R., 50 All. 655

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 36—*Purchase at auction of zamindari property—Possession delayed—Collection of rents by judgment-debtor—Method of apportioning collections between judgement-debtor and auction-purchaser.*] Plaintiff, on the 20th of February, 1919, became the purchaser at an auction-sale held in execution of a decree of some zamindari property. He did not, however, get possession until some time in June, 1919, and meanwhile the judgement-debtor had made certain collections on account of the *rabi* of 1919.

Held, on suit by the auction-purchaser to recover from the judgement-debtor his proportionate share of the moneys collected, that the rights and liabilities between the plaintiff and the defend-

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ant should have been determined on the basis of the total *rabi* rent and the number of days in the *rabi* season, the defendant being given credit for a proportion of the *rabi* rent based on the number of days which fall within the period of his lawful possession, and the plaintiff being credited with a share of the *rabi* rent based on the number of days between the date of his purchase and the date on which the *rabi* rent fell due.

Nand Kishore *v.* Ram Sarup, I. L. R., 50 All. ... 18

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 52—*Lis pendens—Mortgage of property in suit* pendente lite—*Effect of decree on rights of mortgagee.*] *T* and *D* sued *DD* for the recovery of certain property. The suit was decreed, and the defendant appealed. Pending this appeal, the plaintiffs mortgaged an 8 biswa share in village Urena, which was part of the property in dispute, to one *W*. Subsequently the parties compromised the case, and by the decree which was passed in accordance with the compromise each of the parties got half of the property mortgaged, and it was further provided that the defendant *DD* should be liable for the debt due to *W* and that neither *T* nor *D* nor their property should be liable therefor. *W* having sold his rights as mortgagee, the vendees then sued on the mortgage.

Held by SULAIMAN and MUKERJI, JJ., that the mortgage was enforceable only against the 4 biswa share of the village Urena which was still held by *T* and *D*.

Per LINDSAY, J., dissenting :—

A transferee *pendente lite* is bound by the decree just as much as if he were a party to the suit and he must be bound by the whole decree and is not at liberty to take advantage of one part of the decree and repudiate another part.

The mortgage, therefore, was enforceable only against the 4 biswa share which had fallen to *DD* under the compromise.

Sheo Narain v. *Chunni Lal*, I. L. R., 22 All., 243, *Gulzari Lal* v. *Madho Ram*, I. L. R., 26 All., 447, *Faiyaz Husain Khan* v. *Prag Narain*, I. L. R., 29 All., 339, *Radhamadhub Haldar* v. *Monohar Mukerji*, I .L. R., 15 Calc., 756, *Moti Lal* v. *Karrab-uddin*, I. L. R., 25 Calc., 179, *Bellamy* v. *Sabine*, 1 DeG. and J., 566, *Hukm Singh* v. *Zauki Lal*, I. L. R., 6 All., 506, and *Annamala Chettiar* v. *Malayandi Appaya*, I. L. R., 29 Mad., 426, referred to.

Shiam Lal *v.* Sohan Lal, I. L. R., 50 All. ... 290

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 52—*Mortgage Lease executed by mortgagor after passing of decree for sale—Lease voidable by auction purchaser—"Agricultural holding"—Procedure—No vested interest in procedure—.*] *Held* (1) that a lease of complete specific *khewat* numbers, with areas and Government revenue separately specified, and where the lessee is given power to cultivate the lands himself or to have them cultivated by other tenants, is a lease of an agricultural holding within the meaning of the Agra Tenancy Act, 1901;

(2) that a suit for a declaration that such a lease is invalid is not exclusively confined to a civil court and the revenue court has jurisdiction to declare it invalid;

(3) that where such a lease was executed after a decree for sale had been passed on a mortgage which comprised the property leased, the lease could not enure beyond the time when the mortgaged property was sold in execution of the decree, and could be avoided by the purchaser under section 52 of the Transfer of Property Act;

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(4) that enactments dealing with procedure have an immediate effect and must, unless the contrary is expressed, apply to all actions, whether commenced before or after the passing of the Act.

Sher Khan v. *Debi Prasad*, I. L. R., 37 All., 254, *Ram Singh* v. *Girraj Singh*, I. L. R., 37 All., 41, and *Raghunath* v. *Ganesh*, I. L. R., 42 All., 222, referred to. *Rani Dhandei Kuar* v. *Chhotu Lal*, 19 A. L. J., 890, and *Amina Bibi* v. *Saiyid Yusuf*, I. L. R., 44 All., 748, distinguished.

Nisar Husain *v.* Sundar Lal, I. L. R., 50 All. ... 202

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 53—*Fraudulent transfer—Hindu law—Joint family property—Partition after decree obtained against the father.*] The sons in a joint Hindu family at any time up to attachment of the joint family property can enter into a partition with their father with the express object of avoiding attachment of what up to the time of the partition has been joint family property, and if they do so, their individual property acquired by the partition will not be liable to attachment. The partition can only be set aside on evidence showing fraud, and the mere fact of the desire to save their property will not be sufficient to justify an inference of fraud. *Indar Pal* v. *The Imperial Bank of India*, I. L. R., 37 All., 214, distinguished. *Bhagwant* v. *Kedari*, I. L. R., 25 Bom., 202, *Krishnasami Konan* v. *Ramasami Ayyar*, I. L. R., 22 Mad., 519, and *Peda Venkanna* v. *Sreenivasa Deekshatalu*, I. L. R., 41 Mad., 136, followed.

Gaya Prasad *v.* Murlidhar, I. L. R., 50 All. ... 137

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 55, CLAUSE (1) (*g*)—*Act No. IX of* 1872 (*Indian Contract Act*), *section* 69—*Sale of immovable property—Discharge of incumbrance—Purchaser discharging undisclosed mortgage—Liability of vendor—Construction of contract.*] A stipulation in a contract for the sale of immovable property that in the event of part of the property being sold as the result of an undisclosed incumbrance the vendor shall repay a proportionate part of the consideration, does not affect the vendor's obligation under section 55, clause (1) (*g*) of the Transfer of Property Act, 1882, to pay incumbrances, nor the consequent right of the purchaser under section 69 of the Indian Contract Act, 1872, to recover from the vendor the amount paid in discharge of a mortgage decree obtained after possession has been taken.

Bhagwati *v.* Banarsi Das, I. L. R., 50 All. ... 371

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTIONS 74, 82, 95 AND 100—*Suit for contribution—Limitation—Act No. IX of* 1908 (*Indian Limitation Act*), *schedule I, article* 132—"*Subrogation*"—"*Incumbrance.*"] *JR*, being the owner of a large amount of immovable property, executed a number of mortgages on different dates and in favour of different mortgagees, and in several instances the same items of property were mortgaged more than once. One of these mortgages, dated the 23rd of September, 1899, was put in suit and a decree obtained thereon, when one *CL*, who was a party to the decree and was interested as a puisne mortgagee of one of the items included in the mortgage and also as a purchaser of the same, paid the whole of the decretal amount on the 19th of July, 1916. Thereafter *CL* sold all the rights which he had acquired by this payment to *AA* and others, who on the 25th of April, 1922, brought the present suit, asking for contribution as against several properties held by the defendants.

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Held, that the suit was not barred by limitation. The right to contribution arose on the payment made on the 19th of July, 1916, and under article 132 of the first schedule to the Indian Limitation Act, 1908, the plaintiffs had twelve years within which to sue. *Raj Kamini Debi* v. *Mukanda Lal Bandapadhya*, 57 Indian Cases, 868, dissented from. *Shib Lal* v. *Munni Lal*, I. L. R., 44 All., 67, *Ashfaq Ahmad* v. *Wazir Ali*, I. L. R., 14 All., 1, and *Har Prasad* v. *Raghunandan Prasad*, I. L. R., 31 All., 166, referred to.

Meaning of the term "subrogation" discussed. *Digambar Das* v. *Harendra Narayan Pandey*, 14 C. W. N., 617, and *Ahmad Wali Khan* v. *Shasm-ul-Jahan Begam*, I. L. R., 28 All., 482, referred to.

Held also, on a construction of section 82 of the Transfer of Property Act, 1882, that the term "incumbrance" as therein used was not confined to mortgages, but included any other sort of incumbrance also. *Hari Raj Singh* v. *Ahmad-ud-din Khan*, I. L. R., 19 All., 545, referred to.

Aziz Ahmad Khan *v.* Chhote Lal, I. L. R., 50 All. ... 569

ACTS—1884—XIII (AGRICULTURISTS LOANS ACT), SECTION 1—Taqavi *loan—Act (Local) No. III of* 1901 *(United Provinces Land Revenue Act), sections* 145, 183, 233(*m*)—*Alleged wrongful attachment of property to realize* taqavi—*Payment under protest followed by suit against Secretary of State.*] One RN having died owing a certain sum to Government as *taqavi*, the revenue authorities attached a she-buffalo in the possession of DR on the ground that the latter was the heir of RN and that the buffalo was the property of the deceased. DR objected to the attachment, but his objection was overruled. He thereupon paid under protest the amount of *taqavi* claimed, and got back the buffalo, but meanwhile its calf had died owing to its separation from the mother. He then sued the Secretary of State for India in Council for refund of the money paid, for damages for the death of the calf, and for the price of the milk of which he had been deprived owing to the alleged wrongful attachment.

Held, that section 183 of the United Provinces Land Revenue Act applied, and the applicant was competent to maintain a suit against the Secretary of State, but only for the recovery of the amount paid and not for damages.

Balwant Singh v. *The Secretary of State for India*, I. L. R., 25 All., 527, followed. *Tulsa Kunwar* v. *Jageshar Prasad*, I. L. R., 28 All., 563, *The Secretary of State for India in Council* v. *Mahadei*, I. L. R., 19 All., 127, *The Secretary of State for India in Council* v. *Sukhdeo*, Weekly Notes, 1898 p. 173, and *Sahai* v. *Bindeshri Singh*, Weekly Notes, 1905, p. 237, referred to.

Daya Ram *v.* The Secretary of State for India in Council, I. L. R., 50 All. 354

ACTS—1887—VII (SUITS VALUATION ACT), SECTION 8, *See* Act No. VII of 1870, section 7, clause (iv) (c) 610

ACTS—1887—IX (PROVINCIAL SMALL CAUSE COURTS ACT), SECTION 17—*Act No. IX of* 1908 *(Indian Limitation Act), schedule I, article* 164—*Application for re-hearing—Necessity for furnishing security within time.*] The giving of security within the time limited by article 164 of the first schedule to the Indian Limitation Act, 1908, is a necessary condition precedent to the entertainment of an application under section 17 of the Provincial Small Cause Courts Act, 1887, for the re-hearing of a suit which has been decreed *ex parte*. *Badlu Singh* v. *Panthu Singh*, 21 A. L. J., 173.

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and *Assan Mohammed Sahib* v. *Rahim Sahib*, I. L. R., 43 Mad., 579, referred to.

Suraj Prasad v. Baldeo, I. L. R., 50 All. 254

ACTS— 1887—IX (PROVINCIAL SMALL CAUSE COURTS ACT), SCHEDULE II, ARTICLE 42—*Jurisdiction—Suit by one co-mortgagor who had been obliged to pay the entire decree on the mortgage for reimbursement—Act No. IX of* 1872 (*Indian Contract Act*), *section* 69.] Only such suits are barred by the Provincial Small Cause Courts Act as are actually covered by the words of the different articles and not those which are in substance like suits described in those articles.

A suit, therefore, for contribution brought by one co-mortgagor against another—not being a suit falling under section 95 of the Transfer of Property Act, 1882, but rather under section 69 of the Indian Contract Act, 1872—is not excluded from the jurisdiction of a Court of Small Causes. *Talaimand Singh* v. *Gobind Singh*, 13 A. L. J., 694, *Gaya Pande* v. *Amar Deo Pande*, 22 A. L. J., 855 and *Raza Husain* v. *Hasan Jan*, 13 A. L. J., 632, referred to.

Muhammad Ali v. Maktub-un-nissa, I. L. R., 50 All. ... 428

ACTS—1890—VIII (GUARDIANS AND WARDS ACT), SECTION 3—*Letters Patent, section* 12—*Guardian and minor—Joint Hindu family—Application by* karta *to be appointed guardian of minor members.*] Neither the High Court nor the District Court will contemplate the appointment of a guardian of property, whether that guardian be the manager or no, in the case of a joint Hindu family, by virtue of any powers suggested to be conferred under the Guardians and Wards Act (VIII of 1890). *Jhabbu Singh* v. *Ganga Bishan*, I. L. R., 17 All., 529, *Ellen Ramm* v. *Charles Spencer*, 2 A. L. J., 81, *Jairam Luxmon, Petitioner*, I. L. R., 16 Bom., 634, *Jagannath Ramji, Petitioner*, I. L. R., 19 Bom., 96, and Re *Manilal Hurgovan*, I. L. R., 25 Bom., 353, referred to.

The High Court has jurisdiction, by virtue of clause 12 of the Letters Patent, in respect of the persons and properties of minors, but the High Court refused to exercise that jurisdiction in the case of a joint Hindu family, on the grounds of inexpediency and want of precedent.

In the matter of Govind Prasad, I. L. R., 50 All. ... 709

ACTS—1890—VIII (GUARDIANS AND WARDS ACT), SECTION 29—*Guardian and minor—Sanction of court to sale of minor's property—Condition subsequent imposed on guardian—Effect of guardian's failure to comply.*] A District Judge, while granting permission to a certified guardian of a minor to transfer the minor's property, can impose conditions on the guardian; but a distinction must be drawn between a condition precedent and a condition subsequent imposed on the guardian. The only duty cast upon the transferee by law is that he must satisfy himself that the order sanctioning the transfer has been strictly complied with by the guardian up to the time of the execution of the deed of transfer and that no conditions precedent imposed by the order have been violated. If by the order sanctioning the transfer, the guardian and not the transferee is directed to do certain acts after the execution of the deed of transfer, the failure of the guardian to comply with that direction cannot affect the validity of the transfer. *Dyam Khan* v. *Sarat Chandra De*, 26 C. W. N., 218, and *Kunja Mal* v. *Gauri Shanker*, 3 A. L. J., 30, referred to. *Sri Thakur Kishori Ramanji Maharaj* v. *Duley Ram*, 22 A. L. J., 155, distinguished.

Subhan Ali v. Chittu, I. L. R., 50 All. 63

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ACTS—1890—VIII (GUARDIANS AND WARDS ACT), SECTION 30, *See* Mortgage 218

ACTS—1890—VIII (GUARDIANS AND WARDS ACT), SECTIONS 33 AND 43—*Distinction between provisions of the two sections—Effect of guardian filing a suit on behalf of his ward without obtaining consent of court.*] The guardian of a minor Muhammadan girl, with the consent of the District Judge, entered into certain arbitration proceedings with the object of settling disputes beween his ward and her brothers. An award was made and a decree in accordance therewith followed. Subsequently the girl married, being still a minor, and her husband was appointed her certified guardian. The husband then applied to the District Judge for permission to institute a suit on behalf of his wife to get the arbitration proceedings and the decree based thereon set aside. The Judge refused permission.

Held that no appeal lay from such order. But there was nothing in the Guardians and Wards Act to prevent a guardian from filing a suit on behalf of his ward without the consent of the Judge; only, in such a case the guardian would not have the protection afforded by sub-clause (3) of section 33 of the Act.

Taskin Fatma *v.* Muhammad Munim Bakhsh, I. L. R., 50 All. 535

ACTS—1890—IX (INDIAN RAILWAYS ACT), SECTIONS 3 (4) AND 122—*" Railway "—Staff quarters not part of a " railway " within the meaning of section* 3(4).] Staff-quarters or any building of a residential character, though they may be on railway land, cannot be deemed to be a part of a " railway " within the meaning of section 3(4) of the Indian Railways Act, 1890.

Where a person was found playing cards at the house of a railway employee, situated between two railway lines, and there was no evidence to show that his entry on these premises was unlawful: *held*, that he could not rightly be convicted under section 122 of the Railways Act. *Margam Aiyar* v. *Mercer*, 23 Indian Cases, 177, referred to.

Emperor *v.* Lodai, I. L. R., 50 All. 34

ACTS—1890—IX (INDIAN RAILWAYS ACT), SECTION 76—*Risk-note form B—Negligence—Burden of proof—Act No. IX of* 1872 *(Indian Contract Act), sections* 151, 152 *and* 160.] *Held*, on a construction of "risk-note form B" that, where a plaintiff is claiming damages from a railway company for the loss of entire packages belonging to one consignment, after the plaintiff has given evidence of the loss, it is for the defendant company to show that there has been no wilful neglect on their part, and by "wilful neglect" is meant the failure to take such precautions as a prudent man would take in respect of his own goods to provide against such loss or theft as a prudent man would contemplate as not merely possible, but as likely. *East Indian Railway Co.* v. *Nathmal Behari Lal*, I. L. R., 39 All., 418, and *East Indian Railway Co.* v. *Sri Ram Mahadeo*, I. L. R., 46 All., 125, not followed. *H. C. Smith, Ltd.* v. *Great Western Railway Co.*, [1922] 1 A. C., 179 distinguished.

Sheo Narain *v.* East Indian Railway, I. L. R., 50 All. ... 246

ACTS—1894—I (LAND ACQUISITION ACT), SECTION 23 (1) (*i*)——*Act (Local) No. VIII of* 1919 *(United Provinces Town Improvement Act), schedule, paragraph* 10 (3)—*Improvement Trust—Valuation of land acquired for purposes of a Trust.*] *Held* (1), that the correct interpretation of section 23, sub-section (1), clause (1) of the Land Acquisition Act, 1894, as amended by paragraph 10, clause (3) of the Schedule to the United Provinces Town Improvement

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Act, 1919, is that the market-value of the land to be acquired is to be calculated exclusively in accordance with the use to which the land is being put on the date on which notice issues under section 29 or section 36 of the United Provinces Town Improvement Act; and (2) that where on such date the land to be acquired is not being put to any use, its market-value may be nil.

Secretary of State for India in Council v. Makhan Das, I. L. R., 50 All. 470

ACTS—1899—II (INDIAN STAMP ACT), SECTION 57 (1) (*b*)—*Stamp—Agreement—Document containing an agreement to pay interest, but also containing items of a two-sided account.*] The first portion of a document, called a *sarkhat*, contained an agreement to pay interest, and was signed by two persons. Below their signatures was an entry of Rs. 500 as having been advanced to these persons on the same date, and then followed entries of a number of items on the credit and debit sides respectively, which were neither totalled nor signed. *Held*, on a reference by the Board of Revenue, that the document did not constitute more than one agreement and was properly stamped with a stamp of the value of eight annas.

In the matter of Shiam Sundar Lal, Shankar Lal, I. L. R., 50 All. 504

ACTS—1908—IX (INDIAN LIMITATION ACT), SECTION 10; SCHEDULE I, ARTICLE 62—*Limitation—Suit on behalf of an idol to recover money alleged to have been misappropriated by the mutawalli or manager.*] *Held* that a suit brought in the name of an idol installed in a Hindu temple to recover money alleged to have been wrongfully diverted to his own use by the manager or *mutawalli*, instead of having been employed in the service of the idol, is not a suit against a trustee in whom property has become vested in trust for any specific purpose, within the meaning of section 10 of the Limitation Act, but is a suit for money payable by the defendant for money received by the defendant for the plaintiff's use.

Vidya Varuthi v. *Balusami Ayyar*, I. L. R., 44 Mad., 831, followed.

Jaisth Madho Achariyaji v. Thakur Sri Gath Ashram Narainji, I. L. R., 50 All. 265

ACTS—1908—IX (INDIAN LIMITATION ACT), SECTIONS 19, 20, and 21, *See* Act No. IX of 1872, section 251 982

ACTS—1908—IX (INDIAN LIMITATION ACT), section 20, *See* Civil Procedure Code, order XXI, rule 2 (3) 259

ACTS—1908—IX (INDIAN LIMITATION ACT), SCHEDULE I, ARTICLE 12, *See* Civil Procedure Code, section 47; order XXI, rule 92 ... 686.

ACTS—1908—IX (INDIAN LIMITATION ACT), SCHEDULE I, ARTICLES 62 AND 97—*Sale—Price paid but property not delivered—Suit for return of price—Limitation.*] Where a purchaser pays the price of property which he has bought, but fails to obtain possession from the vendor, he has a right to sue for the return of the purchase-money, which commences from the date when delivery is asked for and refused. The suit is governed, as regards limitation, by either article 97 or article 62 of the first schedule to the Indian Limitation Act, 1908. *Mul Kunwar* v. *Chattar Singh*, I. L. R., 30 All., 402, *Arunachala* v. *Ramasami*, I. L. R., 38 Mad., 1171, referred to. *Janak Singh* v. *Walidad Khan*, 13 A. L. J., 669, and *Hanuman Kamat* v. *Hanuman Mandur*, I. L. R., 19 Calc., 123, followed.

Kundan Lal *v.* Bisheshar Dayal, I. L. R., 50 All. ... 95

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ACTS—1908—IX (INDIAN LIMITATION ACT), SCHEDULE I, ARTICLE 85—*Limitation—Principal and agent.*] Defendants, who were dealers in grain, employed the plaintiffs as commission agents and provided (as principals) to start with certain sums of money to serve as cover. Plaintiffs were then asked to make certain purchases in the market. The plaintiffs made the purchases, spent for the purpose what money of the defendants they had, and, when necessary, supplied the balance out of their own funds. The amount advanced by the defendants was credited to them in their account. The amount paid by the plaintiffs was debited to the defendants in the same account. Defendants were further debited with plaintiffs' commission and incidental charges. Later on, plaintiffs debited defendants' account with interest on the money they had spent on behalf of defendants. The next transaction might be one of purchase or one of sale of goods previously purchased. If it was a case of purchase, the same process of entry in the account would be gone through. If, however, there was a transaction of sale of goods previously purchased under the orders of defendants, plaintiffs sold the goods, credited defendants with the price fetched, and debited them with plaintiffs' commission and incidental charges. These transactions continued for about a year, and the year of account closed in October, 1920. On the 28th of March, 1923, plaintiffs sued to recover the balance which they alleged to be due to them on the account.

Held, that article 85 of schedule I to the Indian Limitation Act, 1908, applied, and the suit was not barred by limitation. *Sheo Partab Singh* v. *Brij Kishore*, 15 Indian Cases, 336, *Namberumal Chetty* v. *Kotayya*, 21 Indian Cases, 773, *Ram Pershad* v. *Harbans Singh*, 6 C. L. J., 158, *Bank of Multan* v. *Kamta Prasad*, I. L. R., 39 All., 33, *Velu Pillai* v. *Ghose Mahomed*, I. L. R., 17 Mad., 293, *Madhav Motiram* v. *Jairam Sakharam*, 23 Bom. L. R., 510, *Watson* v. *Aga Mehedee Sherazee*, L. R., 1 I. A., 346, and *Ratan Chand* v. *Asa Singh*, 62 Indian Cases, 898, referred to.

Dau Dayal *v.* Piari Lal, I. L. R., 50 All. 645

ACTS—1908—IX (INDIAN LIMITATION ACT), SCHEDULE I, ARTICLES 91 AND 118, *See* Hindu law 885

ACTS—1908—IX (INDIAN LIMITATION ACT), SCHEDULE I, ARTICLES 91 AND 120—*Limitation—Difference between a deed which is null and void and one which is good but voidable.*] Where a deed is *ab initio* null and void, there is no necessity for a person who considers himself aggrieved thereby to come to court promptly and have the deed actually cancelled or set aside, but where a deed is good but is voidable at the option of the party aggrieved, he must come to court within three years to have it set aside.

A suit for a declaration that a transaction embodied in a particular deed was, from its very inception, a sham transaction is to be distinguished from a suit for cancellation of the deed and does not fall within the purview of article 91 of the first schedule to the Indian Limitation Act, 1908. *Sangawa* v. *Huchangowda*, I. L. R., 48 Bom., 166, *Petherpermal Chetty* v. *Muniandy Servai*, I. L. R., 35 Calc., 551, and *Jagardeo Singh* v. *Phuljhari*, I. L. R., 30 All., 375, followed.

Muhammad Nazir *v.* Zulaikha Bibi, I. L. R., 50 All. ... 510

ACTS—1908—IX (INDIAN LIMITATION ACT), SCHEDULE I, ARTICLE 116—*Suit for damages for breach of contract in writing registered——Limitation—Contract evidenced by registered* qabuliat *only, without a* patta.] A suit for damages for breach of contract based upon a registered *qabuliat* signed by the lessee and accepted by

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the lessor, but no *patta* having been executed, is governed as to limitation by article 116 of the first schedule to the Indian Limitation Act, 1908. *Apaji* v. *Nilkantha*, 3 Bom., L. R., 667, *Ambalavana Pandaram* v. *Vaguran*, I. L. R., 19 Mad., 52, *Kotappa* v. *Vallur Zamindar*, I. L. R., 25 Mad., 50, *Girish Chandra Das* v. *Kunja Behari Malo*, I. L. R., 35 Calc., 683, *Bouwang Raja Chellaphroo Chowdhuri* v. *Banga Behari Sen*, 20 C. W. N., 408, and *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur*, I. L. R., 44 Calc., 759, referred to.

Parbati v. Sarup Singh, I. L. R., 50 All. 661

ACTS—1908—IX (INDIAN LIMITATION ACT), SCHEDULE I, ARTICLES 120 AND 126—*Joint Hindu family—Remedies of son against alienation of family property by father—Limitation.*] Article 126 of the Indian Limitation Act, 1908, is based upon the principle that a son's knowledge of alienation by his father ordinarily arises when he sees the alienee in possession. In cases where the alienee never gets possession, no limitation can arise under article 126. In such cases the right of the son will amount merely to obtaining a declaration that the deed is invalid and the limitation prescribed for such a suit is that provided for by article 120.

Held, therefore, that article 126 does not apply to a suit by Hindu sons to set aside a mortgage made by the father in favour of persons who were already in possession under a previous mortgage. *Munia Goundan* v. *Ramasami Chetty*, I. L. R., 41 Mad., 650, referred to.

Bindeshri Upadhiya v. Sital Upadhiya, I. L. R., 50 All. 163

ACTS—1908—IX (INDIAN LIMITATION ACT), SCHEDULE I, ARTICLE 132 *See* Mortgage 328

ACTS—1908—IX (INDIAN LIMITATION ACT), SCHEDULE I, ARTICLE 132, *See* Act No. IV of 1882, sections 74, 82, 95 and 100 ... 569

ACTS—1908—IX (INDIAN LIMITATION ACT), SCHEDULE I, ARTICLE 142, *See* Civil Procedure Code, order XXI, rule 96 813

ACTS—1908—IX (INDIAN LIMITATION ACT), SCHEDULE I, ARTICLES 142 AND 144—*Suit for possession of immovable property—Limitation——Adverse possession—Burden of proof.*] If a suit is for possession by a plaintiff who says that while he was in possession of the property he was dispossessed or has gone out of possession, then he must show possession within twelve years of the suit. But every other case in which a plaintiff claims possession of immovable property must be a case under article 144 of the Limitation Act, unless otherwise specially provided and in such a case limitation only begins to run where the defendant's possession becomes adverse. In such cases the onus lies on the defendant to plead and prove that his possession became adverse and continued adverse for more than twelve years before the suit. *Jai Chand Bahadur* v. *Girwar Singh*, I. L. R., 41 All., 669, and *Secretary of State for India in Council* v. *Chellikani Rama Rao*, I. L. R., 39 Mad., 617, followed.

Ram Surat Singh v. Badri Narain Singh, I. L. R., 50 All. 89

ACTS—1908—IX (INDIAN LIMITATION ACT), SCHEDULE I, ARTICLE 164, *See* Act No. IX of 1887, section 17 ... ... 254.

ACTS—1908—IX (INDIAN LIMITATION ACT), SCHEDULE I, ARTICLE 182 *—Execution of decree—Limitation—Application for substitution of names—"Step in aid of execution"—Civil Procedure Code, order XXI, rule 16; order XXII, rule 1.*] An application for substitution of names is a step in aid of execution. *Pitam Singh* v. *Tota Singh*, I. L. R., 29 All., 301, followed. *Annamalai Mudaliar* v. *Ramier*, I. L. R., 31 Mad., 234, referred to.

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Rule 16 of order XXI applies only to substitution along with execution and there is no bar under any of the rules in schedule I of the Code of Civil Procedure to substitution of names by an executing court when an execution proceeding is already pending.

Mohan Singh *v.* Jagat Singh, I. L. R., 50 All. ... 621

ACTS—1908—IX (INDIAN LIMITATION ACT), SCHEDULE I, ARTICLE 182—*Execution of decree—Purchase by decree-holder—Application by decree-holder qua auction-purchaser for possession—Step in aid of execution—Limitation—Civil Procedure Code, order XXI, rule 95.*] *Held* that an application under order XXI, rule 95, of the Code of Civil Procedure by an auction-purchaser to recover possession of the property purchased cannot be counted as a proceeding in execution and a step in aid of execution by reason of the fact that the auction-purchaser happens to be also the decree-holder. *Bhagwati* v. *Banwari Lal*, I. L. R., 31 All., 82, followed. *Babu Ram* v. *Piari Lal*, I. L. R., 41 All., 479, and *Moti Lal* v. *Makund Singh*, I. L. R., 19 All., 477, referred to.

Mohsin Raza Khan *v.* Haidar Bakhsh, I. L. R., 50 All. 670

ACTS—1908—IX (INDIAN LIMITATION ACT), SCHEDULE I, ARTICLE 183, *See* Civil Procedure Code, section 144; order XLV, rule 15 ... 767

ACTS—1908—XVI (INDIAN REGISTRATION ACT), SECTIONS 17 AND 49, *See* Act No. IV of 1882, sections 4 and 54 986

ACTS—1908—XVI (INDIAN REGISTRATION ACT), SECTION 17 (*b*)—*Registration—Compromise—Recital of agreement between the parties to a mutation case coupled with a request that the property in suit might be partitioned in a particular way.*] *Held*, following the principles laid down in *Satrohan Lal* v. *Nageshwar Prasad*, 19 Oudh Cases, 75; 35 Indian Cases, 770, *Bakhtawar* v. *Sundar Lal*, I. L. R., 48 All., 213, and *Mahomed Musa* v. *Aghore Kumar Ganguly*, I. L. R., 42 Calc., 801, that a document filed in a mutation case which merely set forth that the parties had settled the matters in dispute between them and that they desired that the property in suit should be partitioned in such and such a manner was not a document the registration of which was necessary.

Gharib Rai *v.* Mukh Lal Rai, I. L. R., 50 All. ... 31

ACTS—1908—XVI (INDIAN REGISTRATION ACT), SECTION 47, *See* Act (Local) No. XI of 1922, section 2 125

ACTS—1912—IV (INDIAN LUNACY ACT), SECTION 62, *See* Civil Procedure Code, sections 115 and 151; order XXXII, rule 15 ... 335

ACTS—1913—VII (INDIAN COMPANIES ACT), SECTIONS 18 AND 28, *See* Act No. IX of 1872, section 78 695

ACTS—1913—VII (INDIAN COMPANIES ACT), SECTIONS 152, 179 AND 234—*Company—Winding up—Official liquidator—Power to refer to arbitration—Civil Procedure Code, schedule II.*] An official liquidator has no power to refer to arbitration under the second schedule to the Code of Civil Procedure any matter in dispute in which the company that he represents is interested.

Dehra Dun Mussoorie Electric Tramway Company, Ltd., (In liquidation). In the matter of——, I. L. R., 50 All. 867

ACTS—1913—VII (INDIAN COMPANIES ACT), SECTION 171—*Company—Liquidation—Decree illegally obtained against company in liquidation—Refusal of liquidator to pay.*] A company (bank) went into voluntary liquidation, and two liquidators were appointed, but

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one of them refused to accept the office. On July 17, 1924, an order was passed by the High Court directing that the liquidation be continued as a liquidation under the supervision of the court. On May 21, 1926, this order was superseded by a further order directing that the liquidation should be by the court. On July 10, 1924, certain creditors brought a suit against two of the directors, the manager, and the bank—described as in voluntary liquidation —through one of the liquidators, and obtained a decree (October 31, 1924) against all the four defendants. The decree was satisfied in part by the two directors in their personal capacity. Later the balance of the decree was claimed against the official liquidator, who refused to pay.

Held, that the liquidator was right in refusing, inasmuch as the decree was not binding on the company in liquidation, first, because it was in contravention of section 171 of the Indian Companies Act, 1913, and, secondly, because the liquidator, after his co-liquidator against whom it was framed had refused to act, had not authority to act as a liquidator.

The bar imposed by section 171 of the Indian Companies Act, 1913, cannot be waived by a liquidator. *Narasimham* v. *Subramaniam*, [1927] A. I. R., (Mad)., 201, referred to.

In the matter of the Allahabad Trading and Banking Corporation, Ltd., I. L. R., 50 All. 419

ACTS—1913—VII (INDIAN COMPANIES ACT), SECTIONS 179 AND 215—*Liquidator—Civil Procedure Code, order XXI rule 72—Sales in execution of decrees in favour of the company in liquidation—Jurisdiction to grant permission to the liquidator to bid.*] The Judge in winding up has no jurisdiction to make an order giving a liquidator permission to bid at sales held in execution of mortgage decrees passed in favour of a company in liquidation. Such jurisdiction is vested under the Code in execution courts.

On the other hand, under sections 179 and 215 of the Companies Act, a Judge of the High Court exercising winding up jurisdiction can sanction any reasonable step which the liquidator may desire to take in the interest of the winding up, in which the primary concern is the interest of the creditors and the shareholders, and therefore has power to sanction his applying to the execution court, either in a particular case or generally in all cases in which he thinks it desirable, for leave to bid as a decreeholder under order XXI, rule 72 of the Code of Civil Procedure.

Bank of Upper India, Ltd., Meerut *v.* Fanny Skinner, I. L. R., 50 All. 173

ACTS—1913—VII (INDIAN COMPANIES ACT), SECTION 215—*Company——Liquidation—Power of court in a voluntary liquidation to stay execution of decree against the company.*] *Held*, on a construction of section 215 of the Indian Companies Act, 1913, that the court has power, in a voluntary liquidation, to stay further proceedings in execution of decrees obtained against the company prior to the resolution for voluntary liquidation, though that is a power which in a compulsory liquidation does not exist, because the statute itself forbids execution being taken out. *Anglo-Baltic and Mediterranean Bank* v. *Barber and Co.*, [1924] 2 K. B., 410, and *Black and Co's case*, 8 Ch. App., 254, referred to.

In re the Sri Yogashram Pharmacy, Ltd., (in liquidation), I. L. R., 50 All. 482

ACTS—1914—VIII (INDIAN MOTOR VEHICLES ACT), SECTIONS 6, 8, 9 AND 16—*United Provinces Motor Vehicles Rules, 1924, rules* 20, 21, *and* 24—*Licence—Permit—Failure to produce permit—Power of district authority to prescribe route along which a public motor*

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vehicle shall ply for hire.] *Held*, (1) that there is no power given to the "district authority" either by the Indian Motor Vehicles Act, 1914, or by the rules framed thereunder, which enables that authority to prescribe the route along which a public motor vehicle authorized to ply for hire shall run, and (2) that there is no provision in either the Act or the rules which renders punishable the non-production of a "permit" issued under rule 24, as distinct from a licence prescribed by section 6 and rules 20—22.

Emperor *v.* Hasan Ahmad, I. L. R., 50 All., ... 876

ACTS—1920—V (PROVINCIAL INSOLVENCY ACT), SECTIONS 41, 44 *and* 34—*Insolvency—Surety—Effect of order of discharge on the claim of a person who had gone surety for the insolvent and had been compelled to pay.*] K was surety for the payment of a debt due by G to D. G applied to be declared insolvent and in due course G was discharged. D then sued K and got a decree against him. Thereafter K sued G for recovery of the amount which he had been compelled to pay.

Held that the order of discharge was a bar to the suit. *In re Blackpool Motor Car Company, Ltd.*, [1901] 1 Ch., 77, followed.

Gangadhar *v.* Kanhai, I. L. R., 50 All. 606

ACTS—1920—XIV (CHARITABLE AND RELIGIOUS TRUSTS ACT), SECTION 3—*Application for particulars relating to a trust—"Person interested in a trust".*] *Held* that, in regard to a trust the object of which was the maintenance of a public dharamshala in a certain city, a person who was a resident of that city, a Brahman by caste, and secretary of the local Dharm Asthan Sudhar Committee, was as person interested in the trust within the purview of section 3 of the Charitable and Religious Trusts Act, 1920, and therefore entitled to apply to the District Judge to call upon the manager of the dharamsala to furnish certain particulars as specified in the Act.

Lakhpat Rai *v.* Durga Prasad, I. L. R., 50 All. ... 830

ACTS—1922—XI (INDIAN INCOME-TAX ACT), SECTIONS 2 (1) (*a*), 3 AND 4—*"Agricultural income"—Money-lender taking a usufructuary mortgage of agricultural land and immediately leasing it back to the mortgagor—Rent not liable to income-tax.*] If a person carrying on a money-lending business lends money in the course of such business on the security of lands of which he takes a usufructuary mortgage and if he immediately leases those lands back to the mortgagor with a stipulation for fixed annual payments, which amount to a definite percentage on the sum advanced, *held*, that these annual payments should be excluded from the assessment of the profits and gains of his business, as being "agricultural income" within the meaning of section 2(1)(*a*) of the Indian Income-Tax Act, 1922. *Partington* v. *Attorney-General*, L. R., 4 E. and I. App., 100, referred to.

In the matter of Makund Sarup, I. L. R., 50 All. ... 495

ACTS—1922—XI (INDIAN INCOME-TAX ACT), SECTION 4—*Income-tax—"Agricultural income"— Stone quarries—Profits not exempt from assessment to income-tax because they have already been taken into account in the assessment of land revenue.*] There is no provision in the Income-Tax Act which exempts from liability to assessment profits from stone quarries, not being agricultural income, which have already been taken into account in assessing land revenue.

In the matter of Shib Lal, Ganga Ram, I. L. R., 50 All. 98

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ACT No. XI OF 1922 (INDIAN INCOME-TAX ACT), SECTIONS 22 AND 23—*Income-tax—Notice under section 22(1) served on assessee after he has made a return—Non-compliance—Powers of income-tax officer.*] If an assessee has made a return in compliance with a notice under section 22 (2) of the Indian Income-tax Act, 1922, and thereafter a notice has been served upon him under section 22 (4) and the assessee has failed to comply with that notice, the Income-tax officer is entitled to make an assessment under section 23(1) on account of that failure and he is not bound to proceed under section 23 (3). *Brijraj Ranglal* v. *Commissioner of Income-tax*, [1927] A. I. R., (Pat.), 390, dissented from.

In the matter of Chandra Sen Jaini, I. L. R., 50 All. ... 589

ACTS—1923—X (INDIAN PAPER CURRENCY ACT), SECTION 25—*Promissory note—Note framed as payable to lender or order not within the prohibition of the Act.*] *Held*, that a document which consisted of a promissory note and a receipt, and in the latter the promissory note was described as "*indultalab*" meaning "on demand", and in the note the words were that the money would be paid "on demand to him, that is, to the lender, or to whomever he orders it to be paid", was not obnoxious to the provisions of section 25 of the Indian Paper Currency Act, 1923. *Chidambaram Chettiar* v. *Ayyasawmi Thevan*, I. L. R., 40 Mad., 858, and *Jetha Parkha* v. *Ramchandra Vithoba*, I. L. R., 16 Bom., 689, referred to

Ajudhia Prasad v. Rikhnath, I. L. R., 50 All. ... 764

ACTS—1923—X (INDIAN PAPER CURRENCY ACT), SECTION 25—*Promissory note payable on demand to lender or bearer or to order—Note invalid—Question whether a suit on an independent obligation will lie and to what extent the note may be used as evidence.*] Held that a promissory note payable on demand to the lender or the bearer or to order offends against the provision of section 25 of the Paper Currency Act, 1923, and therefore cannot form the basis of a suit.

Held, by BOYS and KENDALL, JJ., that the payee can, however, sue on the basis of any obligation, whether antecedent to or arising simultaneously with the execution of such a promissory note, independently of the execution of the promissory note. *Hedayat Ali Beg* v. *Nga Kyaing*, 24 Indian Cases, 721, *Shanmuganatha Chettiar* v. *Srinivasa Aiyar*, 35 Indian Cases, 219, *Chidambaram Chettiar* v. *Ayyasawmi Thevan*, I. L. R., 40 Mad., 585, *Nachimuthu Chetty* v. *Andiappa*, 42 Indian Cases, 706, and *Natarajulu Naicker* v. *Subramanian Chettiar*, I. L. R., 45 Mad., 778, referred to. *Held, also*, that where there is other evidence outside the promissory note of the obligation sued upon, such a promissory note would be admissible as evidence to be read in conjunction with that other evidence to arrive at a decision as to whether the independent obligation is proved. Where there is no other evidence, while the promissory note is still admissible in evidence, there can be no decree on the basis of it alone.

Mian Bakhsh v. Bodhiya, I. L. R., 50 All. 839

ACTS—1924—VI (CRIMINAL TRIBES ACT), SECTIONS 20 AND 22—*Criminal tribe—Member of, failing to report—Summary trial—Criminal Procedure Code, section 260.*] One Bihari Bhar was tried summarily by a Magistrate of the first class for an offence under "section 22 of Act VI of 1924," and was convicted and sentenced to three months' rigorous imprisonment. He appealed from jail, and the Sessions Judge acquitted him on the sole ground that the offence could not be tried summarily.

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Held, on appeal by the Local Government against this order of acquittal, (1) that the Magistrate ought to have recorded specifically the precise offence, amongst those mentioned in section 22 of the Criminal Tribes Act, with which the accused was charged and of which he was convicted, (2) that the offence which the accused had committed was the omission to comply with clause (*b*) of division (C) of rule 8 framed by the Local Government under section 20 of the Act, and (3) that, as this offence was punishable with a maximum sentence of six months' rigorous imprisonment, the Sessions Judge was wrong in acquitting him merely because the trial was a summary one.

Emperor *v.* Bihari Bhar, I. L. R., 50 All. 718

ACTS (LOCAL)—1901—II (AGRA TENANCY ACT), SECTIONS 95 AND 167—*Act (Local) No. III of* 1901 *(United Provinces Land Revenue Act), section* 42—*Suit for a declaration that defendant is a trespasser—Effect of previous decision of a revenue court as to defendant's status.*] In proceedings under section 42 of the United Provinces Land Revenue Act, 1901 to which the zamindar was a party, a revenue court decided that the defendant was a non-occupancy tenant, and the zamindar made no appeal against this decision. Subsequently, the zamindar sued in a civil court for a declaration that the defendant was a trespasser. *Held*, that the suit could not be maintained, the previous finding of the revenue court that the defendant was a non-occupancy tenant being binding upon the plaintiff. *Jagannath v. Balwant Singh*, I. L. R., 44 All., 692, referred to.

Sheoambar Singh *v.* Sheoambar Singh, I. L. R., 50 All. 55

ACTS (LOCAL)—1901—II (AGRA TENANCY ACT), SECTIONS 164 AND 201 (3)—*Suit for profits—Presumption—"Shall presume."*] If the conditions laid down in section 201(3) of the Agra Tenancy Act, 1901, are fulfilled, the presumption raised is irrebuttable and conclusive, and the court is not entitled to go into any such question as whether the plaintiff and defendant are members of the same joint family of which the defendant is the *karta*. *Durga Prasad v. Hazari Singh*, I. L. R., 33 All., 799, and *Sheo Narain v. Bela Rai*, I. L. R., 44 All., 616, followed.

Girdhari Lal *v.* Gobind Rai, I. L. R., 50 All. ... 25

ACTS (LOCAL)—1901—II (AGRA TENANCY ACT), SECTIONS 164(2), 165 AND 166—*Lambardar and co-sharer—Liability of representative of deceased lambardar for the negligence or misconduct of his predecessor.*] A plaintiff can, in a suit against the lambardar, prove negligence or misconduct with a view to getting a decree against the lambardar personally or, in a suit against a holder of the assets of the lambardar, can prove the negligence or misconduct of the deceased lambardar in order to get a decree against the estate of the deceased lambardar in the hands of such holder.

The words "plaintiff" and "defendant" as used in sub-section (2) of section 164 are merely synonyms for the "co-sharer" and "lambardar" referred to in sub-section (1), just as they are used in section 165. *Dip Singh* v. *Ram Charan*, I. L. R., 29 All., 15, and *Bharat Singh* v. *Tej Singh*, I. L. R., 40 All., 246, referred to.

Haidari Begam *v.* Sriman Thakur Lakshmi Narainji Maharaj, I. L. R., 50 All. 101

ACTS—(LOCAL)—1901—II (AGRA TENANCY ACT), SECTION 165—*Lambardar and co-sharer—Suit by lambardar against co-sharer for profits of* sir *or* khudkasht *in excess of his share.*] A lambardar cannot sue as lambardar one or more co-sharers for any

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sum due from them by reason of their holding as *sir* or *khudkasht* excess land. *Bishambhar Nath* v. *Bhullo*, I. L. R., 34 All., 98, followed. *Ganga Singh* v. *Ram Sarup*, I. L. R., 38 All., 223, dissented from. *Kundan Lal* v. *Basant Rai*, 75 Indian Cases, 330, referred to.

A suit under section 165 of the Tenancy Act must be one for accounts primarily and it must be shown by figures that the other co-sharers have no claim to the excess which the particular co-sharer, who is plaintiff, is claiming. The fact that the plaintiff may have paid off another co-sharer out of his own pocket will not give the plaintiff a right to recover the money so paid from a third co-sharer.

Koka v. Chunni, I. L. R., 50 All. 342

ACTS (LOCAL)—1901—III (UNITED PROVINCES LAND REVENUE ACT), SECTION 42, *See* Act (Local) No. II of 1901, sections 95 and 167 55

ACTS (LOCAL)—1901—III (UNITED PROVINCES LAND REVENUE ACT), SECTION 99, *See* Regulation No. II of 1925, article 4 440

ACTS (LOCAL)—1901—III (UNITED PROVINCES LAND REVENUE ACT), SECTIONS 107 AND 111—*Partition—Objections based on adverse possession overruled as frivolous—Question of proprietary title—Appeal.*] In a suit for partition, whether a question of proprietary title is raised or not depends on the exact objections raised by an objector, and when an objector claims to be in possession of any particular plot of land by adverse possession, that certainly raises a question of title.

Where an Assistant Collector rejected objections taken to the partition, on the ground that they were, on the face of them, frivolous, it was *held*, that he must be deemed to have chosen to decide the question raised in the objections on the merits, and therefore an appeal lay to the District Judge.

Ram Narain v. *Jagan Nath Prasad*, I. L. R., 38 All., 115, and *Bhagwan Dut* v. *Brij Bhukan*, 75 Indian Cases, 868, followed. *Nand Ram* v. *Brahmkhayal*, 22 Indian Cases, 949, and *Muhammad Nasar-ullah Khan* v. *Muhammad Ishaq Khan*, I. L. R., 32 All., 523, referred to.

Ram Prasad v. Mithan Lal, I. L. R., 50 All. ... 107

ACTS (LOCAL)—1901—III (UNITED PROVINCES LAND REVENUE ACT), SECTIONS 111 AND 112—*Appeal—Civil or Revenue court—Question of proprietary title—Right of co-sharer to hold in severalty.*] The right of a co-sharer to hold in severalty, if disputed, involves a question of a proprietary title, within the meaning of sections 111 and 112 of the United Provinces Land Revenue Act, 1901.

Tulsi Ram v. *Gate Ram Rai*, Weekly Notes, 1904, p. 225, *Muhammad Nazarullah Khan* v. *Muhammad Ishaq Khan*, I. L. R., 32 All., 523, *Ram Narain* v. *Jagan Nath Prasad*, I. L. R., 38 All., 115, and *Parsidhan Rai* v. *Dhaneshar Rai*, 86 Indian Cases, 1033, referred to.

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ACTS—(LOCAL)—1903—11 (BUNDELKHAND ALIENATION OF LAND ACT), SECTION 16A—*Act (Local) No. XI of 1922 (Agra Pre-emption Act), sections 3, 7 and 12—Pre-emption—Plaintiff not belonging to same agricultural tribe as vendor—Competence of Collector to sanction*

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suit for pre-emption.] Plaintiff claimed a right on the strength of a custom recorded in the wajib-ul-arz to pre-empt certain property, situated in Bundelkhand and sold by a co-sharer in the mahal to a non-co-sharer. Both the vendor and the vendee were members of an agricultural tribe. The plaintiff was not; but he had obtained the Collector's sanction to bring suits to pre-empt under section 16A of the Bundelkhand Alienation of Land Act of 1903 as amended by Act No. IV of 1915.

Held, that the plaintiff had lost all right of pre-emption, not only because, after the passing of section 3 of the Pre-emption Act, 1922, he could not claim to pre-empt on the basis of custom, apart from the provisions of the Act itself, but also because, the land being in Bundelkhand, he was barred from any right to pre-empt, which he would otherwise have had under section 12 of the Pre-emption Act, by section 7 of that Act. *Suraj Bhan* v. *Somwarpuri*, I. L. R., 37 All., 662, referred to.

Phul Chand *v.* Ram Nath, I. L. R., 50 All. 430

ACTS (LOCAL) 1912—VI (UNITED PROVINCES PREVENTION OF ADULTERATION ACT), SECTIONS 4, 12 AND 15—*Sale of adulterated ghi—Prosecution duly sanctioned, but complaint not lodged within time—Jurisdiction.*] *Held* on a construction of sections 12 and 15 of the United Provinces Prevention of Adulteration Act, 1912, that a conviction under section 4 was not invalidated by reason of the complaint not having been preferred within the time limited, although, had the accused refused to attend in answer to the summons issued against him, he could not have been prosecuted under section 174 of the Indian Penal Code.

Emperor *v.* Ram Chand, I. L. R., 50 All. 853

ACTS (LOCAL)—1919—VIII (UNITED PROVINCES TOWN IMPROVEMENT ACT), schedule, paragraph 10, *See* Act No. I of 1894, section 23 (1) (*i*) 470

ACTS (LOCAL)—1922—XI (AGRA PRE-EMPTION ACT), SECTIONS 1 AND 3—*Pre-emption—Customary right of pre-emption within a municipal area.*] Inasmuch as any area included within the limits of a municipality is expressly excluded from the operation of the Agra Pre-emption Act, 1922, it follows that a custom of pre-emption prevailing in such area remains unaffected.

Sri Ram *v.* Jwala Shankar, I. L. R., 50 All. ... 178

ACT (LOCAL)—1922—XI (AGRA PRE-EMPTION ACT), SECTION 2—*Act No. XVI of* 1908 (*Indian Registration Act*), *section* 47—*Registration—Applicability of the Agra Pre-emption Act*, 1922, *to a sale-deed executed before but registered on the date when the Act came into force.*] *Held* that the Agra Pre-emption Act, 1922; did not apply to a sale-deed which was executed on the day previous to its coming into operation, though registered on the latter date. *Sarju Prasad* v. *Bhagwati Prasad*, 23 A. L. J., 373, and *Kalyanasundaram Pillai* v. *Karuppa Mooppanar*, I. L. R., 50 Mad., 193, referred to.

Muhammad Bashir Khan *v.* Kulsum Bibi, I. L. R., 50 All. 125

ACTS (LOCAL)—1922—XI (AGRA PRE-EMPTION ACT), SECTIONS 3, 7 AND 12, *See* Act (Local) No. II of 1903, section 16A 430

ACTS (LOCAL)—1922—XI (AGRA PRE-EMPTION ACT), SECTIONS 4(3) AND 16—*Pre-emption—Claim based on the Act and partly on the Muhammadan law—Effect of failure of one ground—"Land."*]

The property which was the subject of a suit for pre-emption consisted of a zamindari share and also a one-third share in a

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house and a sugarcane pressing mill. The plaintiff sued to pre-empt the zamindari under the provisions of the Agra Pre-emption Act, 1922, and the share in the house and the mill on the basis of the Muhammadan law. She failed in her claim under the Muhammadan law because the necessary demands had not been properly made.

Held, that the whole claim should be dismissed, section 16 of the Agra Pre-emption Act not having made any change in the law in this respect.

Muhammad Wilayat Ali Khan v. *Abdul Rab*, I. L. R., 11 All., 108, *Mujibullah* v. *Umed Bibi*, I. L. R., 21 All., 119, *Abdul Rahman* v. *Hedayat-ullah*, 12 A. L. J., 88, and *Pucch* v. *Izz Fatima Bibi*, 19 A. L. J., 107, followed.

Aliter, if the claim for pre-emption of the house and the sugarcane pressing mills was based on the plaintiff's right to pre-empt these properties under the Act as being attached to the land upon which they stood, and if the whole of such land was included in the sale.

Abdul Khan *v.* Shakira Bibi, I. L. R., 50 All. ... 348

ACTS (LOCAL)—1922—XI (AGRA PRE-EMPTION ACT), SECTION 4 (10)—*Pre-emption—"Sale"—Transfer under a compromise decree.*] No suit for pre-emption will lie where a transfer of property is brought about by a decree, although that decree may be based on a compromise. *Intizar Husain* v. *Jamna Prasad*, 1 A. L. J., 217, and *Abdur Razzaq* v. *Mumtaz Husain*, I. L. R., 25 All., 334, referred to.

Paras Ram *v.* Neksai, I. L. R., 50 All. 454

ACTS (LOCAL)—1922—XI (AGRA PRE-EMPTION ACT), SECTION 12 (3)—*Pre-emption—Competition between sister and uncle—"The common ancestor."*] In respect of a suit for pre-emption under the Agra Pre-emption Act, 1922, and considered as heirs according to the Muhammadan law, there is no difference in degree between a sister and an uncle of the vendor; but as regards descent from the common ancestor the sister is the nearer, for "the common ancestor" must be construed as "the nearest common ancestor."

Held also, that a pre-emptor who is only of equal degree with the vendee cannot claim to have the property sold divided between himself and the vendee. *Jagrup Singh* v. *Indrasan Pande*, I. L. R., 47 All., 910, and *Ishwar Upadhiya* v. *Mahesh Dat Upadhiya*, I. L. R., 48 All., 317, referred to.

Ashraf Bibi *v.* Muhammad Abdul Raoof, I. L. R., 50 All. 404

ACTS (LOCAL)—1922—XI (AGRA PRE-EMPTION ACT), SECTIONS 13 AND 20—*Pre-emption—Successful suit by one of several rival pre-emptors no bar to suit by others for a share of the property pre-empted.*] Where there are several possible pre-emptors of equal degree, the fact that one has instituted a successful suit for pre-emption is no bar to the others—if they are within limitation—suing for a proportionate share in the property pre-empted. *Raj Narain Rai* v. *Dunia Pande*, I. L. R., 32 All., 310, followed.

Kundan Lal *v.* Amar Singh, I. L. R., 50 All. ... 61

ACTS (LOCAL)—1926—III (AGRA TENANCY ACT), SECTIONS 44, 230 AND 273—*Suit for ejectment of a trespasser by proprietor of agricultural land—Jurisdiction—When suit entertainable by a civil court.*] Plaintiff, as proprietor of an agricultural holding, brought a suit in the Munsif's court for the ejectment of defendant on the ground that the latter was a trespasser. Defendant pleaded that he was a tenant of the plaintiff, that rent had been accepted from him and that under section 44 of the Agra Tenancy Act, 1926, the

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suit was not entertainable in a civil court. *Held*, on a reference under section 267 of the Act, that the suit fell within the four corners of section 273 and was entertainable by the civil court. But if the court was satisfied that the suit related to an agricultural holding, it must frame an issue on the defendant's plea of tenancy and submit the record to the appropriate revenue court for the decision of that issue only, and ultimately decide the suit accepting the finding of the revenue court on the issue so referred.

The jurisdiction of the civil court to refer such an issue is expressly provided by section 273, and is not intended to be barred by the provisions of section 230.

Section 44 was probably enacted in order to allow facilities to an owner of agricultural land in seeking a speedy remedy through the revenue court if the defendant has taken possession without his consent and if he is prepared to accept damages up to the maximum prescribed. *Debi Sahai* v. *Daulat*, 8 L. R., Revenue, 101, referred to.

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CIVIL AND REVENUE COURTS, *See* Act (Local) No. III of 1901, sections 111 and 112 193

CIVIL PROCEDURE CODE, SECTION 2 (11); ORDER XXII, RULE 5—*Abatement of appeal—"Legal representative"—Effect of order bringing a person on the record as legal representative of a deceased appellant.*] When, by an order which has become final, a certain person's name has been brought on to the record of an appeal as the legal representative of the deceased appellant, it is not open to the respondent to urge that the appeal has abated because some other heirs have been left out.

Muhammad Zafaryab Khan *v.* Abdul Razzaq Khan, I. L. R., 50 All., ... 857

CIVIL PROCEDURE CODE, SECTION 11—Res judicata—*"Might and ought" First suit for possession based on title—Second suit for possession as mortgagee—Two courts of different grades—Second suit comprising property claimed in first suit as well as other claims against other defendants.*] *R* mortgaged with possession a certain property to *M*. After *R's* death, *F*, who had inherited a two-fifths share in the property, sold without authority the entire property to the mortgagee *M*. *T*, who had inherited a one-fifth share, brought a suit in the Munsif's court for possession of her share. Her title was proved and the suit was decreed, *M* not having raised the defence that in any case he was entitled to retain possession as usufructuary mortgagee. Thereafter *M's* name was removed from the revenue records as a mortgagee, and he brought a suit in the Subordinate Judge's court against *T* and the other heirs of *R*, for recovery of possession as mortgagee over a three-fifths share of the pro-

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perty (excluding the two-fifths share of *F*, of which *M* had become full owner).

Held, that so far as *T* and her one-fifth share were concerned, the suit was barred by the principle of *res judicata*.

Tamiz-un-nissa Bibi *v.* Syed Muhammad Husain, I. L. R., 50 All. 306

CIVIL PROCEDURE CODE, SECTION 11—Res judicata—*Mutual and common account—Suit by one party on the account followed by a decree—Second and similar suit by the other party not maintainable.*] *A* and *N* were in the habit of purchasing goods of a similar nature from each other, and of these transactions one mutual account was kept. On this account *A* sued *N* and obtained an *ex parte* decree. *N* tried to get this decree set aside, but failed. He then sued *A* on the same account for the same year, but beginning and ending about a month earlier.

Held, that the suit would not lie, being barred by the principle of *res judicata*. *Hook* v. *Administrator-General of Bengal*, I. L. R., 48 Calc., 499, referred to.

Nizam-ud-din *v.* Ahmad Bhai & Co., I. L. R., 50 All. ... 28

CIVIL PROCEDURE CODE, SECTIONS 11, 96 AND 100; ORDER XLI, RULE 35—Res judicata—*Cross-appeals from a decree in one suit disposed of by one judgement followed by two separate decrees—Appeal to High Court against one decree only—Act No. XVIII of* 1879—*(Legal Practitioners Act), section* 28—*Oral agreement as to setting off fees to be earned by the debtor against amount due on a promissory note.*] Plaintiff sued to recover Rs. 3,270-15-0 as due on a promissory note executed by defendant. The defence was that owing to a certain collateral agreement nothing at all was due. The trial court found for the plaintiff to the extent of Rs. 1,721-9-2. Both sides appealed, the plaintiff claiming the full amount claimed in the plaint; and the defendant again denying his liability *in toto*. These two appeals were decided by one judgement, which reduced the amount payable to the plaintiff to Rs. 1,145, and in consequence dismissed the plaintiff's appeal. Two separate decrees were, however, prepared, and the plaintiff appealed against the decree passed in his own appeal, but not against the decree passed in the defendant's appeal. *Held*, that the appeal was not barred by the principle of *res judicata*.

The defence in the suit was that there was an oral agreement between the parties that the amount ostensibly due on the promissory note should not be paid in cash, but should be, so to speak, "worked off" by professional service to be rendered by the defendant, who was a pleader. *Held*, that in view of the distinct provisions of section 28 of the Legal Practitioners Act, 1879, this defence was not open.

Ghansham Singh v. *Bhola Singh*, I. L. R., 45 All., 506, *Damodar Das* v. *Sheoram Das*, I. L. R., 29 All., 730, *Lalla Raghoobuns Sahoy* v. *Musammat Asloo* 20, W. R., 294, *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan*, I. L. R., 11 All., 267, *Mariamnissa Bibi* v. *Joynab Bibi*, I. L. R., 33 Calc., 1101, *Panchanada Velan* v. *Vaithinatha Sastrial*, I. L. R., 29 Mad., 333, *Zaharia* v. *Debia*, I. L. R., 33 All., 51, and *Ram Kirpal* v. *Rup Kuari*, I. L. R., 6 All., 269, referred to.

Nannu Prasad *v.* Nazim Husain, I. L. R. , 50 All. ... 517

CIVIL PROCEDURE CODE, SECTIONS 13 AND 14—*Suit on a foreign judgement—"Judgement given on the merits of the case"—Assertion by defendant that he was not residing within the jurisdiction when the suit was filed—Burden of proof.*] In a suit

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brought in the Rampur State the judgement, after giving a summary of the plaint, ran as follows:—"The defendant, notwithstanding due service of summons, has not contested the suit. The document is registered. The failure of the defendant to contest the suit amounts to an admission of the plaintiff's claim. Accordingly the plaintiff's suit is decreed."

Held, on suit brought by the plaintiff on this judgement in a British Indian Court, (1) that the judgement of the Rampur court was a judgement "on the merits of the case" within the meaning of section 13 (*b*) of the Code of Civil Procedure; (2) that, a certified copy of the judgement having been produced by the plaintiff, the British Indian Court was bound to presume that the judgement was pronounced by a court of competent jurisdiction; and, if the defendant wished to get rid of that presumption, on the allegation that he was not residing in Rampur on the date when the suit was filed, it was for him to prove that he was not, and not for the plaintiff to prove that he was.

Keymer v. *Visvanatham Reddi*, I. L. R., 40 Mad., 112, *Cole* v. *Harper*, I. L. R., 41 All., 521, and *Kassim Mamooje* v. *Isuf Mahomed Sulaiman*, I. L. R., 29 Calc., 509, referred to.

Ishri Prasad v. Sri Ram, I. L. R., 50 All. 270

CIVIL PROCEDURE CODE, SECTION 24(1)—*Transfer of Small Cause Court suit to court not having Small Cause powers—Appeal.*] During the pendency of a suit before a Subordinate Judge having Small Cause Court powers, the Subordinate Judge was transferred and was replaced by another Subordinate Judge who had not such powers. The suit was then transferred, by order of the District Judge, first to the Munsif, and then to the Additional Munsif, by whom it was tried. *Held* that section 24(1) of the Code of Civil Procedure applied and no appeal lay from the decision of the Additional Munsif. *Kauleshar Rai* v. *Dost Muhammad Khan*, I. L. R., 5 All., 274, followed. *Dulal Chandra Deb* v. *Ram Narain Deb*, I. L. R., 31 Calc., 1057, and *Madhusudan Gope* v. *Behari Lal Gope*, 27 C. L. J., 461, referred to.

Ram Charan, Banwari, Lal v. Kishori Lal, Ram Sarup, I. L. R., 50 All. 810

CIVIL PROCEDURE CODE, SECTION 47; ORDER XXI, RULE 92—*Execution of decree—Property included in sale certificate in excess of what was ordered to be sold—Suit for recovery of excess—Limitation—Act No. IX of* 1908 (*Indian Limitation Act*), *schedule* I, *article* 12.] In execution of a decree for sale on a mortgage certain property, which was neither included in the mortgage in suit nor in the decree, in some unexplained manner found its way into the sale certificate. The decree-holder himself was the auction purchaser.

Held, on suit by the judgement-debtors to recover the property sold in excess of what ought to have been sold, that the suit was not barred by either section 47 or order XXI, rule 92, of the Code of Civil Procedure and, as the sale of the excess property claimed was a nullity, article 12 of the first schedule to the Indian Limitation Act, 1908, could have no application. *Thakur Barmha* v. *Jiban Ram Marwari*, I. L. R., 41 Calc., 590, followed.

Bulaqi Das v. Kesri, I. L. R., 50 All. 686

CIVIL PROCEDURE CODE, SECTION 60—*Execution of decree—"Debts"—Attachment—Debts not yet due.*] The word "debts" as used in section 60 of the Code of Civil Procedure applies only to debts actually due: it cannot include debts, e.g., rent, which may become

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due in future. Rent which has not yet become due cannot be attached either as a debt or as an actionable claim. *Sher Singh* v. *Sri Ram*, I. L. R., 30 All., 246, and *Webb* v. *Stenton*, 11 Q. B. D., 518, referred to.

Lachman v. Jarbandhan, I. L. R., 50 All. 507

CIVIL PROCEDURE CODE, SECTION 66—*Joint Hindu family—Purchase at execution sale of property by father in the name of a stranger—Partition—Suit by member of family for possession of property so purchased.*] The father in a joint Hindu family made a purchase at an execution sale of certain property in the name of one *K*, who was an outsider. Subsequently, the family property was partitioned and the particular piece of property in question fell to the share of *R. R.*, being resisted in his attempt to obtain possession from K, brought a suit to have his right established and for possession. *Held*, that the suit was barred by section 66 of the Civil Procedure Code. *Baijnath Das* v. *Bishan Devi*, I. L. R., 42 All., 711, followed. *Nataraja Mudaliyar* v. *Ramasami Mudaliar*, I. L. R., 45 Mad., 856, *Bodh Singh Doodhooria* v. *Gunesh Chunder Sen*, 12 Beng., L. R., 317, *Narain Dei* v. *Durga Dei*, I. L. R., 35 All., 138, and *Ganga Sahai* v. *Kesri*, I. L. R., 37 All., 545, distinguished.

Ram Rup Teli v. Khaderu Teli, I. L. R., 50 All. ... 512

CIVIL PROCEDURE CODE, SECTION 68; SCHEDULE III, PARAGRAPH 1—*Execution of decree—Execution transferred to Collector—High Court not competent to interfere with Collector's orders, even though erroneous.*] When a decree has been transferred to a Collector for execution under the provisions of section 68 of the Code of Civil Procedure, it is not competent to the High Court to interfere with the orders passed by him even though they may be obviously not warranted by the provisions of schedule III, paragraph 1, of the Code. *Shahzad Singh* v. *Hanuman Rai*, I. L. R., 46 All., 562, and *Girdhari Lal* v. *Jhaman Lal*, 25 A. L. J. 197, followed. *Mahadaji Karandikar* v. *Hari D. Chikne*, I. L. R., 7 Bom., 332, referred to.

Krishna Das v. Ram Gopal Singh, I. L. R., 50 All. ... 827

CIVIL PROCEDURE CODE, SECTION 92—*Religious endowment—Suit by alleged trustee against a person asserted to be a trespasser—Devolution of right to appoint trustee.*] Section 92 of the Code of Civil Procedure has reference to those cases alone where there is an allegation of breach of some express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the court is deemed necessary for the administration of any such trust.

It has no application to suits where a plaintiff claims possession of the endowed property on the allegation that he is the duly appointed trustee and that the defendant is a trespasser. *Inayat Husain* v. *Faiz Muhammad*, I. L. R., 15 All., 335, *Muhammad Abdul Majid Khan* v. *Ahmad Said Khan*, I. L. R., 35 All., 459, *Puttu Lal* v. *Daya Nand*, I. L. R., 44 All., 721, and *Nilkanth Devrao* v. *Ramkrishna Vithal*, I. L. R., 46 Bom., 101, referred to.

In the absence of a provision in the deed prescribing the mode of devolution to the office of *shebait* of a temple, and in the absence of a custom to the contrary, the power to appoint a successor to a *shebait* reverts to the heirs of the founder of the trust, and a *shebait* has no right to appoint a successor to himself. *Chandranath Chakrabarti* v. *Jadavendra Chakrabarti*, I. L. R., 28 All., 689, *Sheo Prasad* v. *Aya Ram*, I. L. R., 29

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All., 663, and *Sheoratan Kuwari* v. *Ram Pargash*, I. L. R., 18 All., 227, followed.

Ganga Charan *v.* Ram Chandra, I. L. R., 50 All. ... 165

CIVIL PROCEDURE CODE, SECTION 101 (*f*)—*Order filing or refusing to file an award made out of court—Appeal—Court fee.*] *Held* that an appeal lies, under section 101(*f*) of the Code of Civil Procedure, against an order filing or refusing to file an award without the intervention of the court, and that where such an appeal was to a District Judge against the order of a Munsif, the proper court fee was eight annas.

Sarwan Pande *v.* Jagat Pande, I. L. R., 50 All. ... 128

CIVIL PROCEDURE CODE, SECTION 109, CLAUSE (*c*)—*Application for leave to appeal to His Majesty in Council—Valuation of case less than Rs.* 10,000—"*Substantial question of law.*"] Ordinarily none but the parties to a litigation are concerned with the result of a case. In every such case, where the valuation is less than the prescribed limit, there is no right of appeal to His Majesty in Council. It is only when a case is of larger importance and the principle, when finally decided by their Lordships of the Privy Council, will be of benefit, not only to the people who are directly involved in the litigation, but to a considerable body of other people, that leave to appeal should be granted. *Radhakrishna Ayyar* v. *Swaminatha Ayyar*, I. L. R., 11 Mad., 283, *Banarsi Prasad* v. *Kashi Krishna Narain*, I. L. R., 23 All., 247, and *Mathura Kurmi* v. *Jagdeo Singh*, I. L. R., 50 All., 208, followed.

The mere question whether a particular finding by a lower appellate court was a good or bad finding, having regard to the provisions of section 100 of the Code of Civil Procedure, is, in itself, no substantial question of law. *Durga Chowdhrani* v. *Jewahir Singh Chowdhri*, I. L. R., 18 Calc., 23, followed.

Rucheha Saithwar *v.* Hansrani, I. L. R., 50 All. ... 640

CIVIL PROCEDURE CODE, SECTION 110—*Appeal to His Majesty in Council—"Substantial question of law"—Construction of a document.*] *Held*, on an application for leave to appeal to His Majesty in Council, that, the only question for decision in either court being whether the legal relation of the parties arising out of the execution of three documents of even date was that of mortgagor and mortgagee by conditional sale or that of vendor and purchaser subject to an option of re-purchase, the decision of which depended on the application of well-defined legal principles to a particular set of facts, this did not involve a "substantial" question of law within the meaning of section 110 of the Code of Civil Procedure. *Balkishen Das* v. *Legge*, I. L. R., 22 All., 149, *Jhanda Singh* v. *Wahid-ud-din*, I. L. R., 38 All., 570, and *Narasingerji* v. *Parthasaradi Rayanam Garu*, I. L. R., 47 Mad., 729, referred to.

Mathura Kurmi *v.* Jagdeo Singh, I. L. R., 50 All. ... 208

CIVIL PROCEDURE CODE, SECTION 114, *See* Act No. I of 1872, section 114 145

CIVIL PROCEDURE CODE, SECTION 115—*Revision—Non-joinder of necessary party—Order refusing substitution and consequential amendments—"Case decided".*] *Held* that no revision would lie against an order of a Subordinate Judge refusing to substitute as plaintiffs in an original suit certain persons alleged to be interested in the suit, but whose remedy as plaintiffs was already time-barred; the order was a mere interlocutory order, and did not amount to the decision of a "case" within the meaning of section 115 of the Code of Civil Procedure.

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Buddhu Lal v. *Mewa Ram*, I. L. R., 13 All., 561, *Lal Chand* v. *Behari Lal*, I. L. R., 5 Lah., 288, and *Balkrishna* v. *Vasudeva Aiyar*, 44 I. A., 261, *Kalidas Kevaldas* v. *Nathu Bhagavan*, I. L. R., 7 Bom., 217, *Seshan Patter* v. *Veera Raghavan Patter*, I. L. R., 32 Mad., 284, and *Fatmabai* v. *Pirbhai Virji*, I. L. R., 21 Bom., 580, referred to. *Umed Mal* v. *Chand Mal*, 25 A. L. J., 61, distinguished.

Equitable Trust Company *v.* Hafiz Muhammad Halim and Co., I. L. R., 50 All. 276

CIVIL PROCEDURE CODE, SECTIONS 115 AND 151; ORDER XXXII, RULE 15—*Act No. IV of* 1912 (*Indian Lunacy Act*), *section* 62—*Lunacy—Distinction between inquiry under the Lunacy Act and under the Civil Procedure Code—Inherent powers of High Court.*] The matter for determination under section 62 of Act No. IV of 1912 is not the same as the matter for determination in an application under order XXXII, rule 15, of the Code of Civil Procedure. A court, therefore, ought not to refuse to consider an application made to it under order XXXII, rule 15, for the sole reason that another court, of superior jurisdiction, has arrived at a certain decision in a matter under Act No. IV of 1912; and if it does so, this refusal is liable to be called in question under section 151 of the Code of Civil Procedure. *Harnand Lal* v. *Chaturbhuj*, I. L. R., 48 All., 356, referred to.

Chatarbhuj *v.* Harnand Lal, I. L. R., 50 All. ... 335

CIVIL PROCEDURE CODE, SECTION 115; ORDER XXIII, RULE 1—*Revision—Wrong exercise of discretion in allowing withdrawal of suit not a ground for revision.*] The fact that a court has probably exercised a wrong discretion in allowing a plaintiff to withdraw his suit with liberty to bring a fresh one is not a ground for revision within the purview of section 115 of the Code of Civil Procedure. *Jhunku Lal* v. *Bisheshar Das*, I. L. R., 40 All., 612, followed.

Hasan Ali *v.* Lachhman Prasad, I. L. R., 50 All. ... 143

CIVIL PROCEDURE CODE, SECTION 115; ORDER XXIII, RULE 1—*Revision—Order permitting withdrawal of suit with liberty to file fresh suit—Reasons not stated—Material irregularity.*] For a court to invoke order XXIII, rule 1, without giving any reason amounts to a material irregularity in exercising the jurisdiction given to it by that rule. If the court is of opinion that an application to withdraw a suit with liberty to bring a fresh one should be granted, it must set forth its reasons for holding that it should be granted, clearly stating whether it is by reason of a formal defect or by reason of some other sufficient cause.

Kamta Singh *v.* Bhagwan Das, I. L. R., 50 All. ... 199

CIVIL PROCEDURE CODE, SECTION 144; ORDER XLV, RULE 15—*Application for restitution as a necessary consequence of an order of His Majesty in Council—Limitation—Act No. IX of* 1908 (*Indian Limitation Act*), *schedule I, article* 183—*Accidental misdescription of court to which order transmitted for execution—Jurisdiction.*] Where an application is made to obtain restitution as the necessary result of an order of His Majesty in Council, that application must be taken as one to "enforce" an order in Council and will be governed by article 183, and not by the general article 181 of the Indian Limitation Act, 1908.

Baijnath Das v. *Balmakund*, I. L. R., 47 All., 98, and *Brij Lal* v. *Damodar Das*, I. L. R., 44 All., 555, referred to.

In the case of an application under order XLV, rule 15, of the Code of Civil Procedure made within 12 years from the date of the order of the Privy Council, the fact that by inadvertence the

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papers were directed to be sent to a wrong court would not amount to an illegality such as would either vitiate the proceedings or deprive the court, to which the papers were intended to be sent down, of its jurisdiction to proceed with the execution of the decree of the Privy Council.

Sohan Bibi *v.* Baijnath Das, I. L. R., 50 All. ... 767

CIVIL PROCEDURE CODE, SECTION 149, *See* Act No. VII of 1870, section 4 980

CIVIL PROCEDURE CODE, SECTIONS 151 AND 152—*Execution of decree—Correction of accidental slip in judgement and decree—Abuse of the process of the Court.*] In a suit for partition of immovable property a certain portion of the property involved, belonging to one set of defendants, was decreed to the plaintiff and the portion belonging to another set of defendants was exempted, and the amin of the court was ordered to draw up a map shewing what portion of the property had been decreed to the plaintiff. The map, however, showed as having been decreed to the plaintiff the portion which belonged to the exempted defendants, and in consequence of this the plaintiff obtained possession of the property which had not been decreed to him. The exempted defendants applied for correction of the record, which was refused on the ground that the decree was not at variance with the judgement.

In revision the High Court ordered a fresh and correct map to be prepared, and returned the case to the lower court with directions that the revised map should be substituted for that existing on the record.

Sattar *v.* Nazir Khan, I. L. R., 50 All. ... 859

CIVIL PROCEDURE CODE, ORDER IX, RULE 3—*Suit dismissed and application to restore it dismissed—Competence of plaintiff to bring a fresh suit on the same cause of action.*] A suit in a Court of small causes was dismissed because, on the date fixed for hearing, neither party appeared. The plaintiff applied for restoration of the suit; but his application was dismissed.

Held that it was competent to the plaintiff to file a fresh suit on the same cause of action. *Daya Shankar* v. *Raj Kumar*, 20 Oudh Cases, 66, and *Bhudeo* v. *Baikunthi*, 63 Indian Cases, 239, approved.

Govind Prasad *v.* Har Kishan, I. L. R., 50 All. ... 837

CIVIL PROCEDURE CODE, ORDER XXI, RULE 2—*Uncertified payment out of court in respect of mortgage decree—Certification refused—Right of mortgagor to get back money so paid.*] Plaintiff paid a sum of money to defendant to be applied by him *pro tanto* in satisfaction of a mortgage decree preliminary which defendant held against plaintiff. The payment, however, was made out of court and an application for its certification to the court was resisted and ultimately rejected. *Held*, that, although the payment, not having been certified, could not be taken into account as a part satisfaction of the decree, the plaintiff was entitled, as the consideration for the payment had failed, to claim back the money which he had paid, as money in the hands of the defendant received by him to the use of the plaintiff. *Sital Singh* v. *Baijnath Prasad*, I. L. R., 44 All., 668, referred to.

Mahbub Ali *v.* Muhammad Husain, I. L. R., 50 All. 113

CIVIL PROCEDURE CODE, ORDER XXI, RULE 2, SUB-RULE (3)—*Act No. IX of* 1908 (*Indian Limitation Act*), *section* 20—*Execution of decree—Limitation—Certification of previous payments.*] If a decree-holder's application for execution is barred by limitation,

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he cannot save the situation by pleading a previous payment of interest alleged to have been made before limitation had expired and asking the court to certify such payment then and there, i.e., when execution was already time-barred. *Baijnath* v. *Panna Lal*, I. L. R., 46 All., 635, *Gokul Chand* v. *Bhika*, 12 A. L. J., 387, *Chattar Singh* v. *Amir Singh*, I. L. R., 38 All., 204, *Eusuffzeman Sarkar* v. *Sanchia Lal Nahata*, I. L. R., 43 Calc., 207, *Pandurang* v. *Jagya*, I. L. R., 45 Bom., 91, *Masilamani Mudaliar* v. *Sethuswami Ayyar*, I. L. R., 41 Mad., 251, and *Sheikh Elahi Bux* v. *Nawab Lall*, 4 Pat., L. J., 159, referred to.

Piari Mohan Prasad *v.* Raghunath Lal, I. L. R., 50 All. 259

CIVIL PROCEDURE CODE, ORDER XXI, RULE 16; ORDER XXII, RULE 1, *See* Act No. IX of 1908, schedule I, article 182 621

CIVIL PROCEDURE CODE, ORDER XXI, RULES 58, 60 AND 63—*Execution of decree—Attachment—Objection by judgement-debtor that property is trust property and he is in possession as* mutawalli—*Objection upheld—Remedy of decree-holder.*] The objection of a judgement-debtor to the attachment of certain property in execution of a decree against him was that though the property sought to be attached was vested in him, it was vested in him not in his private capacity but as *mutawalli* of a *math*, and, therefore, could not be taken in execution by the decree-holder.

Held that this objection was one under order XXI, rule 58, of the Code of Civil Procedure; that the order of the court upon it was consequently an order passed under order XXI, rule 60, and that therefore the person against whom the order was passed had no right of appeal, but his remedy was by way of suit in accordance with rule 63.

Bhagwan Das v. *Mahmud Bano*, 75 Indian Cases, 1053, *Kartik Chandra Ghose* v. *Ashutosh Dhar*, I. L. R., 39 Calc., 298, *Ramanathan Chettiar* v. *Levvai Marakayar*, I. L. R., 23 Mad., 195, *Murigeya* v. *Hayat Saheb*, I. L. R., 23 Bom., 237, *Upendra Nath Kalamuri* v. *Kusum Kumari Dasi*, I. L. R., 42 Calc., 440, and *Seth Chand Mal* v. *Durga Dei*, I. L. R., 12 All., 313, referred to.

Somwar Gir *v.* Mayanand Gir, I. L. R., 50 All., ... 801

CIVIL PROCEDURE CODE, ORDER XXI, RULE 72, *See* Act No. VII of 1913, sections 179 and 215 173

CIVIL PROCEDURE CODE, ORDER XXI, RULE 95, *See* Act No. IX of 1908, schedule I, article 182 670

CIVIL PROCEDURE CODE, ORDER XXI, RULE 96—*Purchase of undivided share at a sale in execution—Delivery of formal possession—Suit for actual possession—Limitation—Act No. IX of* 1908 (*Indian Limitation Act*), *schedule I, article* 142.] In the case of auction purchase of an undivided share in joint property the only possession which can be delivered is joint possession, and that can be done only as provided by order XXI, rule 96, of the Code of Civil Procedure. Where this has been done, and the judgement-debtor still continues in actual possession along with the other co-owners, limitation in respect of a suit to obtain actual possession by means of physical partition of the share purchased begins to run against the purchaser from the date of delivery of formal possession. *Rajendra Kishore Singh* v. *Bhagwan Singh*, I. L. R., 39 All., 460, and *Jang Bahadur Singh* v. *Hanwant Singh*, I. L. R., 43 All., 520, followed.

Sita Ram Dube *v.* Ram Sundar Prasad, I. L. R., 50 All. 813

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CIVIL PROCEDURE CODE, ORDER XXII, RULE 4, SUB-RULE (3)—*Abatement of Appeal—How far abatement as regards one defendant affects the others—Act (Local) No. III of 1901 (United Provinces Land Revenue Act), sections 111(a) and 233 (b)—Partition—Ouster of jurisdiction of civil court.*] A suit for a declaration of title was filed against two separate sets of defendants and was dismissed, and an appeal against this decision was also dismissed. The plaintiffs appealed to the High Court, and pending this appeal one of the defendants of the second set died and no steps were taken within time to bring his heirs on to the record. *Held* by SULAIMAN, MUKERJI, and ASHWORTH, JJ., on a special reference as to how far the appeal had abated) that the appeal abated as to the second set of defendants, but not as to the first set, whose interests were separate and distinct from those of the second.

Held, also by MUKERJI and ASHWORTH, JJ., that the suit, having been filed after the commencement of partition proceedings in a court of revenue, was not maintainable.

Faqira *v.* Hardewa, I. L. R., 50 All. 559

CIVIL PROCEDURE CODE, ORDER XXIII, RULE 1—*Order permitting withdrawal of appeal—Application for amendment of decree.*] When an appellate court does not judicially deal with the matter of a suit but merely permits an appeal to be withdrawn, so that the decree of the court below is left intact, it cannot be said that it has confirmed the decision appealed from. It is not, therefore, possible for such court to entertain an application for amendment of the decree. *Abdul Majid* v. *Jawahir Lal*, I. L. R., 36 All., 350, *Nand Lal Saran* v. *Dharam Kirti Saran*, I. L. R., 48 All., 377, and *Pitam Lal* v. *Balwant Singh*, 23 A. L. J., 518, followed.

Deoki *v.* Jwala Prasad, I. L. R., 50 All. 608

CIVIL PROCEDURE CODE, ORDER XXIII, RULE 1—*Withdrawal of suit, with liberty to bring fresh suit—"Formal defect"—Revision.*] Where a court allowed a plaintiff to withdraw his suit with liberty to bring a fresh one upon the ground that he had not given formal proof of a document which was essential to his success, it was *held* that the court was within its jurisdiction, and that the High Court should not interfere. *Jhanku Lal* v. *Bisheshar Das*, I. L. R., 40 All., 612, followed. *Baijnath Pande* v. *Babban Pande*, I. L. R., 49 All., 159, distinguished.

Chandrika Lal *v.* Sami Nath, I. L. R., 50 All. ... 835

CIVIL PROCEDURE CODE, ORDER XXIII, RULES 1 AND 3—*"Lawful agreement"—Compromise effected during pendency of appeal before High Court—Undue influence—Inherent powers of High Court.*] A suit by a wife against her husband for recovery of her dower-debt was dismissed. Plaintiff appealed to the High Court. Pending the appeal, the parties entered into an agreement in pursuance of which a joint application was made to the trial court stating that the parties had agreed that the suit should be dismissed and asking that the application for compromise should, after due certification, be forwarded to the High Court, so that the appeal might be dismissed in terms of it. The application, after verification by the plaintiff through the munsarim of the court, was sent to the High Court, but before any decree could be passed the plaintiff appellant died, and her heirs were brought upon the record.

Held, on objection taken by the respondent that the appeal could not be proceeded with,—(1) that rule 3, and not rule 1,

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of order XXIII, of the Code of Civil Procedure was applicable; (2) that the word "lawful" in rule 3 referred to agreements which in their very terms or nature were not "unlawful" and, therefore, might include agreements which were voidable at the option of one of the parties on the ground of undue influence, coercion or fraud: *Nand Lal* v. *Ram Sarup*, [1927] A. I. R., Lahore, 546, dissented from: *Budhu Mal* v. *Rup Kour*, [1890], P. R., No. 81, p. 254, and *Ala Bakhsh Khan* v. *Kasim Ali Khan*, [1895] P. R., No. 48, p. 203, referred to; (3) that although it might be open to the Court, under section 151 of the Code of Civil Procedure, to refuse to record a compromise brought about by undue influence ,yet where the person said to have been subjected to undue influence did not repudiate the compromise in her lifetime and the determination of the question of undue influence would have involved an elaborate and lengthy inquiry, the Court did not consider it necessary to exercise its extraordinary powers under section 151 of the Code. *Sreemati Sabitri Thakurain* v. *Savi*, I. L. R., 6 Pat., 108 and *Gajendra Singh* v. *Durga Kunwar*, I. L. R., 47 All., 637, referred to.

Qadri Jahan Begma *v.* Fazal Ahmad, I. L. R., 50 All.... 748

CIVIL PROCEDURE CODE, ORDER XXIII, RULE 3; SCHEDULE II, PARAGRAPH 16 (1)—*Arbitration—Award—Decree passed without allowing time for filing objections—Appeal.*] The parties to a pending suit appeared before the court and stated that they would accept the statement which three pleaders of the court, whose names were mentioned, would make without taking oath, or, if they were not unanimous, the statement of the majority. The pleaders were to decide all the points in dispute among the parties and were also to dispose of the question of costs. On this statement of the parties being recorded, the court referred the case to the three pleaders. The pleaders, after several adjournments, filed a long statement in writing, and thereupon the court proceeded at once to decide the case in accordance with the statement, and, on judgement being given, a decree followed.

Held, that the proceeding was not an agreement or compromise, to which order XXIII, rule 3, of the Code of Civil Procedure would apply, but was an arbitration. Taking it as an arbitration, the court was wrong in not allowing the parties time for filing objections, and an appeal would lie from its decree. *Tursi Ram* v. *Basdeo*, 24 A. L. J., 705, *Muhammad Ashgar Ali Khan* v. *Muhammad Imtiaz Ali*, Weekly Notes, 1898, p. 200, and *Himanchal Singh* v. *Jatwar Singh*, I. L. R., 46 All., 710, referred to.

Baijnath Prasad *v.* Narain Prasad, I. L. R., 50 All. ... 51

CIVIL PROCEDURE CODE, ORDER XXXIV, RULE 1—*Mortgage—Several mortgages held by same mortgagee over same property—Right to sue on the mortgages independently of each other.*] *Per* IQBAL AHMAD, J.:—In view of the provisions of order XXXIV, rule 1, of the Code of Civil Procedure it is open to a subsequent mortgagee to put his mortgage into suit without impleading the prior mortgagee. That being so, it is open to a person holding two mortgages over the same property to put his second mortgage into suit without claiming to enforce his first mortgage, provided he expressly declares his intention of reserving his rights as a prior mortgagee and claims to sell the property in enforcement of the second mortgage subject to his rights as a prior mortgagee.

Per ASHWORTH, J.:—Where a person holds two mortgages over the same property, he cannot sue on the first mortgage alone

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without foregoing the second mortgage. He can, however, sue and sell on a second mortgage provided that he declares the existence of a first mortgage and has it entered in the sale proclamation. If he does not do so, then he must be deemed to have foregone the first mortgage.

Sundar Singh v. *Bholu*, I. L. R., 20 All., 322, *Mata Din Kasodhan* v. *Kazim Husain*, I. L. R., 13 All., 432, and *Ram Shankar Lal* v. *Ganesh Prasad*, I. L. R., 29 All., 385, referred to.

Ram Saran v. Abdul Ghaffar, I. L. R., 50 All. ... 742

CIVIL PROCEDURE CODE, ORDER XXXIV, RULE 6—*Mortgage—Decree—Mortgaged property ceasing to be available for sale through no fault of the mortgagee—Mortgagee's right to a personal decree.*] Where property the subject of a suit for sale on a mortgage has ceased to be available for sale owing to no fault of the mortgagee, the mortgagee is entitled to a personal decree, the whole right to which the morfgagee has had all along, but which right has merely been suspended owing to the fact that his remedy against the mortgaged property was not yet shown to have been exhausted or to be otherwise unavailable. Such a decree is not within order XXXIV, rule 6, of the Code of Civil Procedure, nor based by analogy with order XXXIV, rule 6, on any legal fiction that there has been a sale.

Ram Raghubir v. *Imami Begam*, 9 Indian Cases, 103, *Sheo Din* v. *Bhawani*, 9 Indian Cases, 752; 14 Oudh Cases, 69, and *Brij Behari* v. *Indarpal*, 57 Indian Cases, 967; 23 Oudh Cases, 145, followed. *Pirbhu Narain Singh* v. *Amir Singh*, I. L. R., 29 All., 369, *Bihari Lal* v. *Bisheshar Dayal*, 9 A. L. J., 569, *Darbari Mal* v. *Mula Singh*, I. L. R., 42 All., 519, *Kedar Nath* v. *Chandu*, I. L. R., 26 All., 25, *Satish Ranjan Das* v. *Mercantile Bank of India, Ltd.* I. L. R., 45 Calc., 702, and *Badal Singh* v. *Debi Saran Dube*, I. L. R., 49 All., 506, referred to.

Bisheshar Nath v. Chandu Lal, I. L. R., 50 All. ... 321

CIVIL PROCEDURE CODE, ORDER XXXIV, RULE 8—*Mortgage by conditional sale—Execution of decree—Power of court to extend time for payment.*] The proviso to rule 8 of order XXXIV of the Code of Civil Procedure applies to the whole of the rule and not merely to sub-rule (4). A court, therefore, has power to extend the time for payment in a suit for redemption of a mortgage by conditional sale, just as in the case of any other kind of mortgage.

Narsingh Prasad Singh v. Pratap Singh, I. L. R., 50 All. 882

CIVIL PROCEDURE CODE, ORDER XXXIV, RULE 14—*Mortgage—Same property subject to a usufructuary mortgage and a later simple mortgage to the same mortgagee—Effect of sale under a decree on the later mortgage.*] Two villages were mortgaged usufructuarily on the 20th of April, 1877, for Rs. 22,000, and half of a third village was hypothecated as collateral security. Four days later, the mortgagee leased the first two villages to the mortgagor, and the mortgagor hypothecated all three villages to the mortgagee as security for the lease-money. The lease-money was not paid and in consequence the lessee was ejected. The mortgagee then, having taken possession, brought a suit on the deed of the 24th of April, 1877 (the second, and simple, mortgage) for the sale of the three villages, subject to his earlier mortgage of the 20th of April, and, having obtained a decree, brought the property to sale and purchased it himself.

Held, on suit by the heirs of the mortgagor to redeem the earlier (usufructuary) mortgage, that what was really sold and purchased by the defendants, mortgagees, decree-holders was the

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plaintiffs' equity of redemption, and, therefore, the suit could not be maintained. *Khairajmal* v. *Daim*, L. R., 32 I. A., 23; I. L. R., 32 Calc., 296, *Lal Bahadur Singh* v. *Abharan Singh*, I. L. R., 37 All., 165, *Sardar Singh* v. *Ratan Lal*, I. L. R., 36 All., 516, *Mata Din Kasodhan* v. *Kazim Husain*, I. L. R., 13 All., 432, and *Parmanand* v. *Daulat Ram*, I. L. R., 24 All., 549, referred to.

Jagat Singh *v.* Jai Narain, I. L. R., 50 All. ... 12

CIVIL PROCEDURE CODE, ORDER XLI, RULE 5—*Execution of decree—Stay order passed by appellate court—Sale held in ignorance of the order—Validity of sale.*] Where a subordinate court went on with the execution of a decree and sold certain property in ignorance of the fact that an order for stay had been passed by the High Court, and the property was purchased by a third party, it was *held* that, there being no other objection, the sale must stand. *Sahu Nand Kishore* v. *Shadi Ram*, 24 A. L. J., 519, distinguished. *The Ganges Flour Mills Co.* v. *Shadi Ram*, 16 A. L. J., 46, *Nonidh Singh* v. *Musammat Sohun Kooer*, 4 N. W. P. H. C. R., 135, *Mian Jan* v. *Man Singh*, I. L. R., 2 All., 686, *Maijha Singh* v. *Jhow Lal*, 6 N. W. P. H. C. R., 351, *Sant Lal* v. *Umrao-un-nissa*, I. L. R., 12 All., 96. *Bessessari Chowdhurany* v. *Harro Sundar Mozumdar*, 1 C. W. N., 226, *Hukum Chand Boid* v. *Kamalanand Singh*, I. L. R., 33 Calc., 927, *Muthu Kumarasami Rowther* v. *Kuppusami Aiyangar*, I. L. R., 33 Mad., 74, *Ramanathan Chetty* v. *Arunachellam Chetty*, I. L. R., 38 Mad., 766, and *Venkatachalapati Rao* v. *Kameswaramma*, I. L. R., 41 Mad., 151, referred to.

Per MUKERJI, J.—The principle of *stare decisis* does not apply, as the question raised is not of substantive law but of procedure alone.

Parsotam Saran *v.* Barhma Nand, I. L. R., 50 All. ... 41

CIVIL PROCEDURE CODE, ORDER XLI, RULE 33, *See* Mortgage ... 218

CIVIL PROCEDURE CODE, SCHEDULE II, *See* Act No. VII of 1913, sections 152, 179 and 234 867

CIVIL PROCEDURE CODE, SCHEDULE II, PARAGRAPH 15 (1) (c).—*Arbitration—Award—Application to revise decree based on award on ground of invalidity of reference.*] The words "being otherwise invalid" in paragraph 15 (1) (c) of the second schedule to the Code of Civil Procedure do not include the question whether there was or was not a valid reference to arbitration. An application in revision will therefore lie on the ground of the initial invalidity of the reference. *Kanhaiya Lal* v. *Jagannath Prasad*, *Hanuman Prasad*, I. L. R., 43 All., 305, *Gopal Das* v. *Baij Nath*, I. L. R., 48 All., 239 and *Tej Singh* v. *Ghasi Ram*, I. L. R., 49 All., 812, followed. *Ajudhia Prasad* v. *Badar-ul-Husain*, I. L. R., 39 All., 489 and *Hari Shankar* v. *Ram Piari*, I. L. R., 45 All., 441, referred to.

Where certain arbitrators appointed in the course of a pending suit at one time returned the papers to the court and said that they did not want to go on with the arbitration but afterwards agreed to continue, and in fact pronounced an award on which a decree was passed in due course; *Held* that in such circumstances the award was not open to objection.

Mahadeo Prasad *v.* Badri Das, Ram Sarup, I. L. R., 50 All. 955

"COMMON ANCESTOR," *See* Act (Local) No. XI of 1922, section 12 (3) ... 404

COMPANY—*Liquidation—Official liquidator—Position of a liquidator as compared with that of the company before liquidation—Costs of*

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proceedings out of court.] Liquidation gives the official liquidators a cause of action which the company may not by itself have possessed.

A member of a company in liquidation is, therefore, liable in respect of unpaid calls, even though as against the company the realization of such calls may have become barred by limitation. *Jagannath Prasad* v. *The U. P. Flour and Oil Mills Company, Limited*, I. L. R., 38 All., 347, followed.

Held further, that the liquidators' claim against an alleged contributory in respect of a certain definite number of shares would not be affected by the fact that the company had previously sued the contributory and had obtained, on a compromise, a decree in respect of only half the number of shares.

Held also, that costs of proceedings out of court by a liquidator in sifting claims and objections ought not to be awarded against the claimants or objectors.

In re Dehra Dun Mussoorie Electric Tramway Company, Ltd., (in liquidation), I. L. R., 50 All. ... 176

COMPANY, *See* Act No. VII of 1913, section 171 419

COMPANY, *See* Act No. VII of 1913, section 215 483

COMPROMISE, *See* Civil Procedure Code, order XXIII, rules 1 and 3 ... 748

COMPROMISE, *See* Act (Local) No. XI of 1922, section 4 (10) ... 454

CONTRACT. Obligation resembling ——, *See* Act No. IX of 1872, sections 72 and 73 818

CONTRIBUTION. Suit for ——, *See* Act No. IV of 1882, sections 74, 82, 95 and 100 569

CO-PARCENARY MAHAL, *See* Zamindar and tenant 479

COSTS, *See* Muhammadan law 733

COSTS—*Taxation of—Contested application for probate before a District Judge—High Court Rules*, 1898, *chapter XVI, rule 2—General Rules (Civil), chapter XXI, rules 23 and 26.*] *Held* that the rule applicable to the taxation of costs in a contested application for probate before a District Judge is rule 26 of chapter XXI of the General Rules (Civil) for subordinate civil courts. Such a proceeding is not a "suit" but a "miscellaneous judicial case." *Sundrabai Saheb* v. *The Collector of Belgaum*, I. L. R., 33 Bom., 256, and *Baijnath Prasad* v. *Sham Sundar Kuar*, I. L. R., 41 Calc., 367, referred to.

Kanhaiya Lal *v.* Gendo, I. L. R., 50 All. ... 238

COURT FEES, *See* Act No. VII of 1870, section 4 980

COURT FEES, *See* Act No. VII of 1870, section 7, clause (iv) (c) ... 610

COURT FEE, *See* Civil Procedure Code, section 101(*f*) 128

CO-WIDOWS, *See* Hindu law 489

CRIMINAL PROCEDURE CODE, SECTIONS 99A, 99B AND 251—*Act No. XLV of* 1860 (*Indian Penal Code*), *section* 153*A*—*Proscription of book by Government—Application to set aside order of Government dismissed by High Court—Effect of order of High Court on trial of author of the proscribed book under section* 153*A of the Indian Penal Code—Act No. I of* 1872 (*Indian Evidence Act*), *sections* 11 *and* 13.] During a trial for an offence under section 153A of the Indian Penal Code, the offence being alleged to have been committed by means of a certain book written by the accused, and when twenty witnesses for the prosecution had been examined, the Local Government, by a notification under section 99A of the Code of Criminal Procedure, proscribed the book in question. The

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accused applied to the High Court, under section 99B of the Code, to set aside this order, and on this application a Bench of three Judges found that "the book contained matter which promoted, or was intended to promote feelings of enmity or hatred between different classes of His Majesty's subjects," and, therefore, dismissed the application. On this order being communicated to him, the trying magistrate at once closed the case, without recording any further evidence, and convicted the accused. The accused appealed to the Sessions Judge; but his appeal was dismissed.

Held, on an application to revise these orders, that the trying magistrate had no alternative, in the face of the decision of the High Court in the same matter, but to convict the accused, and, in these circumstances, was justified in disallowing all further evidence: The High Court therefore refused to interfere.

Held, further, that the decision of the High Court on the application under section 99B was relevant and admissible in evidence under sections 11 and 13 of the Evidence Act.

Emperor *v.* Kali Charan Sharma, I. L. R., 50 All. ... 157

CRIMINAL PROCEDURE CODE, SECTION 107—*Security for keeping the peace—Bonds executed thereupon, without evidence being taken—Legality—Accused expressing their willingness to execute bonds.*] Where an accused, called upon to give security for keeping the peace, said in terms, before any prosecution evidence was recorded, that he was willing to give security, it was *held* that this was sufficient proof that it was necesary for keeping the peace that he should execute a bond, and it was not necessary that any prosecution evidence should be called before taking a bond from him. *Chander Shekhar* v. *Emperor*, 54 Indian Cases, 411, *Emperor* v. *Ghariba*, I. L. R., 46 All., 109, *Jagdat Tewari* v. *Emperor*, 54 Indian Cases, 784, *Ram Charan* v. *Emperor*, 24 A. L. J., 317, *Emperor* v. *Mul Chand*, I. L. R., 37 All., 30, *Prathipati Venkatasami* v. *Emperor*, I. L. R., 30 Mad., 330, *Ram Chandra Haldar* v. *Emperor*, I. L. R., 35 Calc., 674, and *Prem Singh* v. *Emperor*, 41 Indian Cases, 671, referred to.

Emperor *v.* Nasir Ahmad, I. L. R., 50 All. 120

CRIMINAL PROCEDURE CODE, SECTION 107—*Security for keeping the peace—Order passed on the admission of the accused that he is willing to give security.*] Where a person against whom a notice is issued under section 107 of the Code of Criminal Procedure consents to give security, there is no reason why the Magistrate concerned should not proceed to pass orders against him without further inquiry, provided that the Magistrate is satisfied that such person fully understood the meaning of the notice and that he was at liberty to show cause against it if he wished to do so. *Emperor* v. *Ghariba*, I. L. R., 46 All., 109, followed. *Palaniappa Asary* v. *Emperor*, I. L. R., 34 Mad., 139, and *Jagdat Tewari* v. *Emperor*, 54 Indian Cases, 784, referred to.

Emperor *v.* Kishan Narain, I. L. R., 50 All. ... 599

CRIMINAL PROCEDURE CODE, SECTION 108—*Act No. XLV of* 1860 (*Indian Penal Code*), *section* 153*A*—*Proof of one solitary act alone not sufficient for section* 108.] A person who is found on one occasion only circulating notices which may have the effect of promoting enmity between classes may possibly be prosecuted under section 153A of the Indian Penal Code, but he cannot be proceeded against under section 108 of the Code of Criminal Procedure.

Emperor *v.* Chiranji Lal, I. L. R., 50 All. 854

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CRIMINAL PROCEDURE CODE, SECTION 109 (a) AND (b)—*Application of the section, more particularly sub-section* (a).] Section 109 (*a*) of the Code of Criminal Procedure is applicable to a person who, being or coming within the local limits of the jurisdiction of a certain magistrate, takes precautions to conceal his presence with a view to committing an offence. It is not limited to the more restricted case of a person who, with a similar object, takes precautions to conceal the fact of his presence within the local limits of the jurisdiction of a certain magistrate.

So *held by* SULAIMAN, A. C. J., and KENDALL and WEIR, JJ.

The police received information that a number of persons were hiding themselves on a dark night at about midnight in a mango grove outside the *abádi* of a village with a view to commit some offence. When the police went to the grove they found four persons sitting there, who, on being challenged, tried to run away. They were chased, and two of them were captured. They had house-breaking instruments (*jemmies* or *sabarís*) with them. When caught they first gave wrong names and addresses, and then, later on, disclosed their real identities. They were residents of the same sub-division.

Held by SULAIMAN, A. C. J., that section 109 (*a*) was applicable to the above facts, but not 109 (*b*).

Held by BOYS, J., that section 109 (*b*) was applicable, but not 109 (*a*).

Held by BANERJI, J., that neither section 109 (*a*) nor 109 (*b*) was applicable.

Held by KENDALL, J., that both sections 109 (*a*) and 109(*b*) were applicable.

Held by WEIR, J., that section 109 (*a*) was applicable, and quite possibly section 109 (*b*) also, though in the circumstances of the present case it was not necessary to decide whether or not that sub-section applied.

Emperor v. *Bhairon*, I. L. R., 49 All., 210, and *Emperor* v. *Himayat-ullah*, I. L. R., 49 All., 844, overruled. *Rashu Kabiraj* v. *King-Emperor*, 27 C. L. J., 382, *Sheikh Piru* v. *King-Emperor* 41 C. L. J., 142, *Sharif Ahmad* v. *King-Emperor*, 8 A. L. J., 1097, *Ghulam Jilani* v. *Emperor* 17 A. L. J., 432, *Lallu* v. *Emperor*, 17 A. L. J., 891, *Rambirich Ahir* v. *King-Emperor*, I. L. R., 6 Pat., 177, and *Satish Chandra Sarkar* v. *Emperor* I. L. R., 39 Cal., 456, referred to.

Emperor *v.* Phuchai, I. L. R., 50 All. 909

CRIMINAL PROCEDURE CODE, SECTIONS 110 AND 256—*Security for good behaviour—Accused not given an opportunity of cross-examining prosecution witnesses—Illegality.*] A magistrate conducting proceedings under section 110 of the Code of Criminal Procedure is bound to give the accused a reasonable opportunity of cross-examining the prosecution witnesses. If he refuses to do so, this is a good ground for setting aside the proceedings. *Chintamon Singh* v. *Emperor*, I. L. R., 35 Calc., 243, and *Ganga Singh* v. *King-Emperor*, 10 A. L. J., 383, referred to.

Emperor *v.* Tirlok, I. L. R., 50 All. 71

CRIMINAL PROCEDURE CODE, SECTIONS 118, 121 AND 514—*Security for keeping the peace—Bond executed with sureties—Circumstances in which the surety's bond can be declared forfeited—Act No. XLV of* 1860 (*Indian Penal Code*), *section* 172—*Absconding to avoid a warrant of arrest.*] Absconding to avoid arrest under a warrant is not an offence within the meaning of section 172 of

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the Indian Penal Code, nor is it one of the offences specified in section 121 of the Code of Criminal Procedure, for the commission of which alone can a surety's bond be forfeited. *Udham Singh* v. *King-Emperor*, Vol. 48 P. R. (Cr. J.), No. 15, dissented from. *Queen* v. *Womesh Chunder Ghose*, 5 W. R., (Cr. R.), 71, *Majhi Mamud* v. *Emperor*, 2 C. L. J., 625, *Queen* v. *Zahoor Ali*, 4 N.-W. P., H. C. R., 97, and *Queen* v. *Amir Jan*, 7 N.-W. P., H. C. R., 302, followed.

Emperor v. Sheo Jangal Prasad, I. L. R., 50 All. ... 666

CRIMINAL PROCEDURE CODE, SECTIONS 137 AND 139A—*Public nuisance—Distinction between public right and private right—Bonâ fide claim to the exercise of a private right—Procedure.*] Where in the course of proceedings initiated under chapter X of the Code of Criminal Procedure it becomes apparent that there is a *bonâ fide* question of the private rights of the parties involved, the proper course for the court to adopt is to stay the proceedings until such time as rights of the parties concerned have been decided by a competent civil court. *Emperor* v. *Bharosa Pathak*, I. L. R., 34 All., 345, In re *Maharana Shri Jaswantsangji Fatesangji*, I. L. R., 22 Bom., 988, *Jagarnath Sahu* v. *Parmeshwar Narain*, I. L. R., 36 All., 209, *Abdul Wahid Khan* v. *Abdullah Khan*, I. L. R., 45 All., 657, *Bhagwan Das* v. *Emperor*, 73 Indian Cases, 523, and *Manipur* v. *Bidhu Bhushan Sarkar*, I. L. R., 42 Calc., 158, referred to.

Munna Tiwari v. Chandrabali, I. L. R., 50 All. ... 871

CRIMINAL PROCEDURE CODE, SECTIONS 144 AND 561A—*Emergency order—Wrongful use of section to procure the delivery of property by the defendant to the plaintiff in a civil suit.*] Section 144 of the Code of Criminal Procedure cannot legally be used simply to procure the transfer of property and documents from the person in possession to the claimant, because, in the opinion of the court, the claimant is entitled to their possession; and when, as a matter of fact, it has been so used, section 561A of the Code enables the court, if it so thinks fit, to direct that the property and documents in question be retransferred. *Bhaganathi Servai* v. *Valayee*, 33 Indian Cases, 830, and *Chandra Nath Mukerji* v. *Emperor*, 47 Indian Cases, 803, referred to.

Hafiz-ud-din v. Laborde, I. L. R., 50 All. 414

CRIMINAL PROCEDURE CODE, SECTION 161—*Act No. I of* 1872 *(Indian ...Evidence Act), sections* 145 *and* 155—*Limitations on use of statement made under section* 164.] A previous statement of a witness recorded under section 164 of the Code of Criminal Procedure can be used as provided for by sections 145 and 155 of the Indian Evidence Act, 1872; but it cannot be used as substantive evidence of the facts deposed to therein.

Bomanji Cowasjee v. *The Chief Judge and the Judges of the Chief Court of Lower Burma*, L. R., 34 I. A., 55, and *Emperor* v. *Cherath Choyi Kutti*, I. L. R., 26 Mad., 191, referred to. *Puttu* v. *King-Emperor*, 17 Oudh Cases, 363, followed.

Emperor v. Bishan Datt, I. L. R., 50 All. 242

CRIMINAL PROCEDURE CODE, SECTION 239 (*d*), *See* Act No. III of 1867, sections 3 and 4 412

CRIMINAL PROCEDURE CODE, SECTION 260, *See* Act No. VI of 1924, sections 20 and 22 719

CRIMINAL PROCEDURE CODE, SECTION 307—*Acquittal by a jury—Reference to the High Court—What the order of reference should contain.*] In making a reference under section 307 of the Code of Criminal Procedure, the Judge, should, in effect, show the reasons for convicting the accused in as clear a manner as he would have

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done if the case had not been a jury case and he had had to write a convicting judgement.

Emperor *v.* Sheo Din, I. L. R., 50 All. 540

CRIMINAL PROCEDURE CODE, SECTION 307—*Jury—Power of High Court to revise the verdict of a jury on the merits.*] Where a jury has given its verdict on the facts of the case, it is open to the High Court to revise that verdict on a reference by the trial Judge made under section 307 of the Code of Criminal Procedure where it is not alleged that there has been any misdirection by the Judge or any misunderstanding by the jury of the law as laid down by the Judge. *Wafadar Khan* v. *Queen-Empress*, I. L. R., 21 Calc., 955, *Emperor* v. *Lyall*, I. L. R., 25 Calc., 128, *Reg* v. *Khanderav Bajirav*, I. L. R., 1 Bom., 10, *Emperor* v. *Chellan*, I. L. R., 29 Mad., 91, *Emperor* v. *Bhuilotan Singh*, 6 Pat., L. J., 264, and *Emperor* v. *Panna Lal*, I. L. R., 46 All., 265, referred to.

Emperor *v.* Shera, I. L. R., 50 All. 625

CRIMINAL PROCEDURE CODE, SECTION 342—*Extent of protection given to an accused in the matter of statements made by him when being examined in court.*] An accused person being examined by the court under section 342 of the Code of Criminal Procedure was asked why the charge had been brought against him, and he replied that it was through enmity on the part of the complainant. He was then asked if he had anything further to say, and he proceeded to give reasons for the alleged enmity, in the course of which he falsely made defamatory statements against the complainant.

Held, that the accused was exempt from prosecution in connection with the statement so made by reason of section 342(2) of the Code. *Champa Devi* v. *Pirbhu Lal*, 24 A. L. J., 329, *Bai Shanta* v. *Umrao Amir Malik*, I. L. R., 50 Bom., 162, *In re Venkata Reddy*, I. L. R., 36 Mad., 216, and *Satish Chandra Chakravarti* v. *Ram Dayal*, I. L. R., 48 Calc., 388, referred to.

Emperor *v.* Murli Pathak, I. L. R., 50 All. ... 169

CRIMINAL PROCEDURE CODE, SECTION 422—*Jail appeal—Right of accused, where notice has been given, to appear in person at the hearing of his appeal.*] Where a convict has appealed from jail, and notice of the hearing of the appeal has been sent in the terms of section 422 of the Code of Criminal Procedure, the appellant has a right, if he so desires, and if he is not represented by any legal practitioner, to appear in person at the hearing of his appeal. *Queen-Empress* v. *Pohpi*, I. L. R., 13 All., 171, and *Ram Prasad* v. *Emperor*, 103 Indian Cases, 407, dissented from.

Emperor *v.* Lal Bahadur, I. L. R., 50 All. 543

CRIMINAL PROCEDURE CODE, SECTION 439(4)—*Charge of murder—Conviction of culpable homicide—Revision—Jurisdiction on revision—Privy Council practice—Conviction by court without jurisdiction.*] The appellant was tried by a Sessions Judge on a charge of murder under section 302 of the Indian Penal Code. He was convicted under section 304 of culpable homicide not amounting to murder, there being power by section 238 (2) of the Code of Criminal Procedure so to convict him upon the charge under section 302; he was sentenced to five years' rigorous imprisonment. No acquittal of the charge under section 302 was

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recorded. The Local Government did not appeal, but applied for revision on the grounds that the appellant should have been convicted of murder, and that the sentence was inadequate. The High Court thereupon convicted the appellant of murder and sentenced him to death.

Held that the finding at the trial was to be regarded as an acquittal on the charge of murder, and that consequently section 439 (4) of the Code of Criminal Procedure precluded the High Court from having jurisdiction upon revision to convict on that charge; that though upon an appeal by the Local Government the High Court would have had before it the same materials, yet, the order having been made without jurisdiction, an injustice had been done to the appellant, bringing the case within the restricted jurisdiction exercised by the Judicial Committee in criminal matters; that the case should not be remitted to the High Court to consider whether the sentence on the conviction under section 304 should be enhanced, but that the order of that Court should be set aside and the order of the Sessions Judge restored.

In re Bali Reddi, I. L. R., 37 Mad., 119, commented on; *Emperor* v. *Sheo Darshan Singh*, I. L. R., 44 All., 332, and *Emperor* v. *Shivputraya*, I. L. R., 48 Bom., 510, approved.

Kishan Singh *v.* King-Emperor, I. L. R., 50 All. ... 722

CRIMINAL PROCEDURE CODE, SECTION 537—*Irregularity—Riot—Cross cases—Use of evidence given in one case as evidence in the other —Inferences from consent of counsel to irregular procedure.*] There were two cases of riot being tried by the same Magistrate, which, though technically distinct, were both parts of the same controversy. The Magistrate, having tried one of the cases, when he came to the second, treated some of the evidence in the first case, by agreement of counsel in either case, as evidence in the second case—as though it had been solemnly repeated all over again by the witnesses or had been read over to them and acknowledged to be correct, although it was not formally transferred to the record of the second case.

Held, that, inasmuch as the accused could not point to any way in which they might have been prejudiced, the procedure, though irregular, did not vitiate the trial. *Queen-Empress* v. *Chandra Bhuiya*, I. L. R., 20 Calc., 537, followed.

While no serious defect in the mode of conducting a criminal trial can be justified or cured by the consent of the advocate of the accused, the fact that a certain course of procedure was in fact consented to by counsel for an accused person is an important element in considering the equally important question whether there has been any prejudice. *Abdul Rahman* v. *King-Emperor*, L. R., 54 I. A., 96, followed.

Emperor *v.* Sukhai Ahir, I. L. R., 50 All. 457

CRIMINAL TRESPASS, *See* Act No. XLV of 1860, section 447 ... 637

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"DEBTS", *See* Civil Procedure Code, section 60 ... 507

DECREE. Amendment of——, *See* Civil Procedure Code, order XXIII, rule 1 608

DHARDHURA—*Question re applicability of custom—Complete alteration in course of river—No evidence of similar change on previous occasions.*] Notwithstanding the admission of the existence, as between two villages situated on opposite banks of a river, of the custom of *dhardhura*, it was held that such custom was not applicable to the case of the river suddenly and completely altering its course and cutting off a large and recognizable area from one village, in face of the fact that no evidence was given that such a complete change of course had ever happened before for a space of twenty-two years. *Gulab Rai* v. *Girwar Singh*, I. L. R., 49 All., 195, referred to.

Kunj Bihari Lal *v.* Kunwar Jai Mal Singh, I. L. R., 50 All. 691

DISCRETION OF COURT, *See* Divorce 464

DIVORCE—*Husband's petition—Wife charged with committing adultery—Misconduct of petitioner—Discretionary bar—Principles governing exercise of discretion vested in matrimonial courts.*] In the trial of matrimonial cases, the court must have regard not only to the rights and liabilities of the matrimonial person wronged and of the wrong-doer, respectively *inter se*, but also to the interests of society and public morality, and the court should, therefore, in the exercise of every discretion which is vested in it, endeavour to promote virtue and morality and to discourage vice and immorality while exercising its discretion.

Where Parliament has not thought fit to define or specify any cases, or classes of cases, for its application the court ought not to limit or restrict that discretion by laying down rules within which alone the discretion is to be exercised. *Morgan* v. *Morgan*, 1 P and M., 611, *Constantinidi* v. *Constantinidi*, [1903] P., 246, *Wyke* v. *Wyke*, [1904] P., 149, *Pretty* v. *Pretty*, [1911] P., 83, *Schofield* v. *Schofield*, [1915] P., 207, *Tickner* v. *Tickner*, [1924] P., 118, *Constantinidi* v. *Constantinidi*, [1905] P. 270, and *Wickins* v. *Wickins*, [1918] P., 265, referred to.

Sherring *v.* Sherring, I. L. R., 50 All. 464

DOWER, *See* Muhammadan law 86

DOWER, *See* Muhammadan law 423

EARNEST MONEY, *See* Act No. IX of 1872, sections 73, 77, 87 and 88 ... 82

EQUITY OF REDEMPTION, *See* Mortgage 36

ESTOPPEL—*Family arrangement*—"Bonâ fide *dispute.*"] The only requisite necessary to make valid a family arrangement is that it should be a transaction between members of the same family which is for the benefit of the family generally as, for example, one which tends to the preservation of the family property, to the peace or security of the family and the avoiding of family disputes and litigation, or to the securing of the honour of the family.

The expression "*bonâ fide* dispute" means nothing more than that each party must intend to press his claim to the property by litigation or otherwise. It has nothing to do with whether the claim is good or bad in law.

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ESTOPPEL, *See* Act No. IX of 1872, section 11 862

ESTOPPEL, *See* Hindu law 885

EVIDENCE, *See* Act No. I of 1872, section 32(5) 152

EVIDENCE, *See* Act No. I of 1872, section 92 59

EVIDENCE, *See* Criminal Procedure Code, section 164 242

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EXECUTION OF DECREE, *See* Act No. IX of 1908, schedule I, article 182 670

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EXECUTION OF DECREE, *See* Civil Procedure Code, section 60 ... 507

EXECUTION OF DECREE, *See* Civil Procedure Code, section 68; schedule III, paragraph 1 827

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GUARDIAN *ad litem*, *See* Muhammadan law 733

GUARDIAN AND MINOR, *See* Act No. VIII of 1890, section 3 ... 709

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GUARDIAN AND WARD, *See* Act No. VIII of 1890, sections 33 and 43 ... 535

HIGH COURT. Inherent powers of——, *See* Civil Procedure Code, sections 115 and 151; order XXXII, rule 15 335

HIGH COURT. Inherent powers of——, *See* Civil Procedure Code, order XXIII, rules 1 and 3 748

HIGH COURT. Powers of——, *See* Civil Procedure Code, section 68; schedule III, paragraph 1 827

HIGH COURT, Powers of——, *See* Criminal Procedure Code, section 307 625

HIGH COURT. Reference to——in a jury case, *See* Criminal Procedure Code, section 307 540

HIGH COURT RULES, 1898, CHAPTER XVI, RULE 2, *See* Costs ... 238

HINDU LAW—*Adoption—Suit to set aside an adoption—Estoppel—Limitation—Act No. IX of* 1908 (*Indian Limitation Act*),

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schedule I, articles 91 *and* 118—"*Khandani rishtedar*", *interpretation of*——.] *Held*, on a construction of a clause in a will forbidding the adoption by the widow of the testator of a *khandani rishtedar* of her father's family, that the son of a daughter of a brother of the widow was not such a *khandani rishtedar* and his adoption was, therefore, not opposed to the conditions laid down in her husband's will. *Radhay Parshad* v. *Nannu*, 5 Indian Cases, 669, and *Khuman Singh* v. *Hardai*, I. L. R., 11 All. 41, distinguished.

In a suit to have an adoption set aside it is not necessary to sue also to set aside the deed by which the adoption is declared. The deed itself does not confer any status upon the person adopted: it only recites a fact and is evidence of the fact having taken place.

Where an adoption had taken place with great publicity and with due performance of all the necessary ceremonies, and a formal deed of adoption had been executed and registered and the adopted son had been received into the family of his adoptive father, and where, further, the adoption was not challenged for several years, it was *held* that an estoppel was created whereby the adoptive mother was precluded from afterwards disputing the adoption.

Dharam Kunwar v. *Balwant Singh*, I. L. R., 30 All., 519; I. L. R., 34 All., 398, *Sarat Chunder Day* v. *Gopal Chunder Laha*, I. L. R., 20 Calc., 296, and *Bhoomenthal* v. *Fool*, [1897] A. C., 156, referred to. *Dhanraj Joharmal* v. *Soni Bai*, I. L. R., 52 Calc., 482, and *Gopee Lall* v. *Musammat Sree Chundraolee*, L. R., I. A., Sup. Vol., 131, distinguished.

Dharam Prakash *v.* Kalawati Devi, I. L. R., 50 All. ... 885

HINDU LAW—*Deed of settlement—Construction of deed—Gift to wife—Defeasance—Condition subsequent—Invalid condition—Act No. IV of* 1882 (*Transfer of Property Act*), *sections* 28, 30.] A deed of settlement executed in 1875 by a Hindu recited that his only surviving son *B* being of bad character and his declared enemy, he was compelled to exclude him from inheritance, and that there being nobody to represent the settlor except his surviving wife (the Rani), he had, therefore, made a gift to her of all his properties, together with all rights and interests, and he appointed her his successor and representative subject to conditions which followed. By condition 1, the zamindari and *malguzari* in five villages were to be "owned by the Rani just as I owned" them. By condition 2, he made a gift of the *jagir* property in seven villages to the Rani, reserving to himself the income during his life. By condition 6, if during the succeeding 16 years a lawful son were born to *B*, he should take the property on attaining majority, but if at the end of that period no son had been born, the Rani could give or bequeath the property to her daughter, or her daughter's son, and failing them could make an adoption. The settlor died in 1879. The appellant, a son of *B*, born in 1891, after attaining his majority, sued for possession. Conceding that the gift to him was void in Hindu law, since he was not born at the date of the deed, he contended that on the true construction of the deed the Rani's interest terminated on his attaining his majority, and that he was entitled as heir to the settlor.

Held that on the true construction of the deed the Rani and her successors took an estate which was not limited but absolute in point of duration, and that, according to the principle embodied in the Transfer of Property Act, 1882, sections 28, 30, the condition subsequent being invalid, her estate was not affected by it; and accordingly that the suit failed. *Doe* v. *Eyre*, 5 C. B., 713, distinguished.

Narsingh Rao *v.* Mahalakshmi Bai, I. L. R., 50 All. ... 875

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HINDU LAW—*Co-widows—Separation—Alienation by one widow for legal necessity—Other widow's participation in alienation not necessary.*] Two co-widows, having entered into possession of the property of their deceased husband, divided the same between them, and one of them alienated, for legal necessity, a considerable part of her share. *Held*, on suit by the next reversioner, after their death, that the widow was competent to alienate for legal necessity even without the consent of her co-parcener. *Thakuramani Singh* v. *Dai Rani Koeri*, I. L. R., 33 Calc., 1079, followed. *Valluru* v. *Sasapu*, 49 M. L. J., 479, dissented from.

Jai Narain Singh *v.* Munna Lal, I. L. R., 50 All. ... 489

HINDU LAW—*Hindu widow—Alienation—Legal necessity—What evidence may be sufficient to support an alienation challenged after a considerable lapse of time.*] Recitals in a deed of sale with regard to the existence of legal necessity for an alienation by a Hindu widow are not in themselves evidence of such necessity without substantiation by evidence *aliunde*. But, though the onus lies upon the legal representatives of the transferee to prove the necessity for the sale, when it is challenged after a considerable lapse of time, full and detailed evidence cannot be expected, and in such circumstances presumptions are permissible to fill in the details which have been obliterated by time.

Furthermore, it is not absolutely necessary for a transferee to establish the actual existence of family necessities, or to show that the money advanced by him was utilized for such purposes. It is only necessary that a representation should have been made to the purchaser that such necessity existed and that he should have acted honestly and made proper inquiry to satisfy himself of its existence. The recital in the document is clear evidence of a representation, and if the circumstances are such as to justify a reasonable belief that an inquiry would have confirmed its truth, then, when proof of actual inquiry has become impossible, the recital coupled with such circumstances would be sufficient evidence to support the deed.

Brij Lal v. *Indra Kunwar*, I. L. R., 36 All., 187, *Venkata Reddi* v. *Rani Saheba of Wadhwan*, I. L. R., 43 Mad., 541, and *Banga Chandra Dhur Biswas* v. *Jagat Kishore Acharjya Chowdhuri*, I. L. R., 44 Calc., 186, referred to.

Ram Narain *v.* Nandrani Kunwar, I. L. R., 50 All. ... 823

HINDU LAW—*Hindu widow—Suit for declaration by next male reversioner—Nearer female heir in existence—Effect of omission to implead the nearer reversionary heir—Act No. I of* 1877 (*Specific Relief Act*), *section* 42.] Plaintiff alleging himself to be the nearest reversionary heir of her husband, brought a suit against a Hindu widow asking, first, for a declaration of his status as presumptive reversionary heir, and, secondly, for a declaration that a will alleged to have been executed by the husband shortly before his death was a forgery.

At the time of suit there was in existence a nearer heir in the shape of a minor daughter of the defendant, who lived with her, but she was not made a party to the suit.

Held (1) that, as regards the first relief sought, the suit was not maintainable;

(2) that, as regards the second relief, although it is not correct to say that the existence of a nearer female heir can always be ignored by the next male reversioner, yet, even without any express proof of refusal, concurrence or collusion on her part, the court may exercise its discretion and grant the declaratory relief to the male reversioner, and that without insisting upon the

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female heir being joined in the suit, provided that such a course is not prejudicial to her interests. *Rani Anand Kunwar* v. *The Court of Wards*, I. L. R., 6 Calc., 761, *Madan* v. *Malki*, I. L. R., 6 All., 428, *Balgobind* v. *Ram Kumar*, I. L. R., 6 All., 431, *Ishwar Narain* v. *Janki*, I. L. R., 15 All., 132, *Hanuman Pandit* v. *Joti Kunwar*, Weekly Notes, 1908, p. 207, *Raja Dei* v. *Umed Singh*, I. L. R., 31 All., 207, *Lakhpati* v. *Rambodh Singh*, I. L. R., 37 All., 350, *Ramyad* v. *Rambihara* 4 Pat. L. J., 731, *Venkatanarayan Pillai* v. *Subbammal*, I. L. R., 38 Mad., 406, and *Kesho Prasad Singh* v. *Shea Pargash Ojha*, I. L. R., 41 All., 19, referred to.

Deoki v. Jwala Prasad, I. L. R., 50 All. ... 678

HINDU LAW—*Hindu widow—Transfer surrendering in favour of next reversioner, followed by sale-deed by the latter—Transaction amounting to sale by widow—Consent of next reversioner, effect of—Legal necessity—Presumption—Burden of proof.*] A Hindu widow executed a deed of transfer of a portion of the property of her late husband, in favour of a person who at the time was the next presumptive reversioner, purporting to surrender all her interest in the property conveyed. The next day the transferee sold the property, and both deeds were registered consecutively on that day. The transferee died before the widow, and on the widow's death the then reversioners sued the vendee for recovery of the property which he had purchased.

Held that, although it was evidenced by two separate deeds, the whole transaction was really one, and amounted to a transfer by the widow with the consent of the next reversioner, and this could not be upset unless the plaintiffs were prepared to lead evidence (which they were not) to show that there was in fact no legal necessity for the transfer or that the consent of the transferee reversioner had been obtained by fraud. *Rangasami Gounden* v. *Nachiappa Gounden*, I. L. R., 12 *Mad.*, 523, and *Debi Prasad Chowdhry* v. *Golap Bhagat*, I. L. R., 40 Calc., 721, referred to.

Muhammad Sa'id Khan v. Kunwar Darshan Singh, I. L. R., 50 All. 75

HINDU LAW—*Joint Hindu family—Capacity of mother as de facto guardian of her minor son in the compulsory absence of the father to borrow for the purpose of discharging debts due by the father.*] The father in a joint Hindu family, consisting of himself and two minor sons, was convicted in a riot case and sentenced to a long term of imprisonment. Whilst he was in jail and the mother was left as *de facto* guardian of her minor sons, she raised money on a mortgage of some property which her husband had given her, mainly to pay off some debts of his, and to some extent other debts which she had herself incurred on promissory notes. The mortgage being put into court was held for technical reasons to be invalid, but a personal decree was given against the mother.

Held, that the judgement creditor was competent under this decree to proceed against the joint family property, so far as the previous debts of the father were concerned. *Debi Mangal Prasad* v. *Mahadeo Prasad*, I. L. R., 31 All., 234, *Devji* v. *Sambhu*, I. L. R., 24 Bom., 135, and *Verabadra Aiyar* v. *Marudaga Nachiar*, I. L. R., 34 Mad., 188, referred to.

Tara Kiran v. Hari Kishan Das, I. L. R., 50 All. ... 447

HINDU LAW—*Mitakshara—Joint family including minors—Karta—New business started by borrowing money on the security of family property—"Benefit to the estate"—Admitting minor to benefit of partnership—Act No. IX of* 1872 (*Indian Contract Act*), *section* 247.] It is not competent to the manager of a

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joint Hindu family comprising minor members to raise money on the security of the family property in order to start a new business, even if such business may reasonably be supposed likely to be a profitable one. The "benefit to the estate" contemplated by their Lordships of the Privy Council in *Hunooman Persaud Pandey* v. *Babooee Munraj Koonwaree*, 6 Moo. I. A., 393, must be a benefit of a "defensive nature", calculated to protect the estate from possible danger or destruction.

Sanyasi Charan Mandal v. *Krishna Dhan Banerji*, I. L. R., 49 Cal., 560, *Palaniappa Chetty* v. *Sreemath Devasikamony Pandara Sannadhi*, I. L. R., 40 Mad., 709, *Shankar Sahai* v. *Bechu Ram*, I. L. R., 47 All., 381, *Mahabir Prasad Misr* v. *Amla Prasad Rai*, I. L. R., 46 All., 364, *Jagmohan Agrahri* v. *Prag Ahir*, I. L. R., 47 All., 452, *Jado Singh* v. *Nathu Singh*, I. L. R., 48 All., 592, and *Tadibulli Tammireddi* v. *Tadibulli Gangireddi*, I. L. R., 45 Mad., 281, referred to. *Maclaren Morrison* v. *Verschoyle*, 6 C. W. N., 429, distinguished.

Inspector Singh *v.* Kharak Singh, I. L. R., 50 All. ... 776

HINDU LAW—*Joint Hindu family—Alienation of family property by managing member—Benefit to the estate—Whether transaction must necessarily be of a defensive nature—Criteria for judging propriety of transaction.*] In order to sustain an alienation of joint family property made by the managing member of the family the transaction must be one which is for the benefit of the estate and such as a prudent owner would have carried out with the knowledge available to him at the time. Transactions justifiable on the principle of "benefit to the estate" are not limited to those transactions which are of a "defensive nature".

The transaction must be judged, not by its actual results but by what might have been expected to be its results, at the time it was entered into. The degree of prudence which might fairly be required from a person who was not the sole owner of the property might naturally be somewhat greater than that which might be expected in the case of a sole owner and might well be held to be that which would be demanded in ordinary cases from a trustee. *Hunooman Persaud Panday* v. *Babooee Munraj Koonweree*, 6 Moo., I.A., 393, *Sahu Ram Chandra* v. *Rhup Singh*, I.L.R., 39 All., 437, *Palaniappa Chetty* v. *Sreemath Daicasikamony Pandara Sannadhi*, I. L. R., 40 Mad., 709, *Krishna Chandra* v. *Ratan Ram Pal*, 20 C. W. N., 645, *Muneshar Bakhsh Singh* v. *Arjun Singh*, 19 Oudh Cases, 100, *Tula Ram* v. *Tulshi Ram*, I. L. R., 42 All., 559, *Mahabir Prasad Misr* v. *Amla Prasad Rai*, I. L. R., 46 All., 364, *Jado Singh* v. *Nathu Singh*, I. L. R., 48 All., 592, *Sadhu Saran Prasad* v. *Brahmdeo Prasad*, 61 Indian Cases, 20, *Kalika Nand Singh* v. *Shiva Nandan Singh*, 63 Indian Cases, 625, and *Sheotahal Singh* v. *Arjun Das*, 56 Indian Cases 879, referred to. *Shankar Sahai* v. *Bechu Ram*, I. L. R., 47 All., 381, *Bhagwan Das Naik* v. *Mahadeo Prasad Pal*, I. L. R., 45 All., 390, *Inspector Singh* v. *Kharak Singh*, I. L. R., 50 All., 776, and *Rattan Chand* v. *Sri Thakur Ram Kishan Murarji*, 26 A. L. J., 777, not followed.

Jagat Narain *v.* Mathura Das, I. L. R., 50 All. ... 969

HINDU LAW—*Joint Hindu family—Son's liability for father's debts—Defences to suit by creditor—Immorality of father or want of legal necessity—Burden of proof—Antecedent debt.*] Once a mortgagee has established that the loan advanced by him to the mortgagor was for payment of antecedent debts, it is no longer incumbent upon him to prove that these antecedent debts were in themselves for necessity. In order to get rid of his liability, the burden then

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lies on the son to establish that those antecedent debts were tainted with immorality or illegality. *Maharaj Singh* v. *Balwant Singh*, I. L. R., 28 All., 508, referred to. *Nanomi Babuasin* v. *Modhun Mohun*, I. L. R., 13 Calc., 21, and *Brij Narain* v. *Mangal Prasad*, I. L. R., 46 All., 95, followed.

Mere proof of the general immoral habits of a mortgagor at the time the debts were advanced is insufficient to justify the court in presuming that the debts were so tainted. The connexion between the immorality and the debt must be proved before the debt can be vitiated. *Sri Narain* v. *Lala Raghubans Rai*, 17 C. W. N., 124, referred to. *Babu Singh* v. *Bihari Lal*, I. L. R., 30 All., 156, *Narendra Bahadur Singh* v. *Abdul Haq*, 30 Indian Cases, 216, and *Dhullipalla* v. *Kuppa Venkatakrishnayya*, 36 M. L. J., 296; 58 Indian Cases, 797, followed.

Tulshi Ram v. Bishnath Prasad, I. L. R., 50 All. ... f

HINDU LAW—*Joint family property—Mortgage—Mortgage executed by two brothers, one being the* karta, *of the family—Suit on mortgage followed by decree—Right of member of the family not made a party to the suit to challenge the decree before execution without alleging that the original debt was tainted with immorality.*] Two brothers, one of whom was the managing member in a joint Hindu family consisting of themselves and their children, executed a mortgage of some of the family property. The mortgagee sued on his mortgage. One of the brothers having died before decree, his two sons were brought upon the record in his place; but the minor son of the other brother was not made a party to the suit at all. This son, after the mortgagee had obtained a decree, but before it had been executed, sued to have the decree set aside upon the ground that the property concerned was ancestral and that there was no legal necessity for incurring the debt to secure which the mortgage had been executed. He did not allege that the debt was tainted with immorality.

Held, that the suit must fail. *Suraj Bansi Koer* v. *Sheo Persad Singh*, I. L. R., 5 Calc., 148, *Armugham Chetty* v. *Muthu Koundan*, I. L. R., 42 Mad., 711, *Chandradeo Singh* v. *Mata Prasad*, I. L. R., 31 All., 176, *Brij Narain* v. *Mangal Prasad*, I. L. R., 46 All., 95, *Sahu Ram Chandra* v. *Bhup Singh*, I. L. R., 39 All., 437, *Ali Ahmad* v. *Sohan Lal*, 12 A. L. J., 613, and *Gauri Shankar* v. *Jang Bahadur Singh*, 79 Indian Cases, 1008, referred to.

Lal Singh v. Jagraj Singh, I. L. R., 50 All. 546

HINDU LAW—*Joint Hindu family—Partition—Facts necessary to constitute separation—Intention of members.*] Separation is the result of intention among the members of a joint Hindu family That separation can be effected either by deed or by acts, or both by deed and acts. If the deed be unequivocal in its language and the intention of the parties is clear from it, it would not be necessary to prove acts in support of the deed. *Balkishen Das* v. *Ram Narain Sahu*, I. L. R., 30 Calc., 738, and *Palani Ammal* v. *Muthuvenkatachala Moniagar*, I. L. R., 48 Mad., 254, referred to.

Jai Narain Rai v. Baijnath Rai, I. L. R., 50 All. ... 615

HINDU LAW—*Joint Hindu family—Partition between sons—Effect of pendency of partition proceedings on mortgage given by sons—Nature of mother's estate in property given to her on partition.*] Pending proceedings for the partition of joint family property between the sons, the father being dead, the sons mortgaged a portion thereof. On the completion of the partition the portion mortgaged fell to the share of the mother.

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Held, that the doctrine of *lis pendens* applied and the mortgage was not binding on the property in the hands of the mother.

Held also, that a mother at the time of partition has no share as a co-parcener. She is only entitled to maintenance, and if a share is given to her on partition, it is given to her by way of provision for her maintenance, and when the necessity for maintenance ceases, the property will revert to the estate from which it was taken. *Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh*, I. L. R., 34 All., 234, referred to.

Muni Lal *v.* Phula, I. L. R., 50 All. 22

HINDU LAW—*Mitakshara—Joint family property—Partition between uncle and nephew on death of grandfather—Grandmother entitled to a share.*] In the case of partition between a son and a grandson (being the son of a deceased son) of a Hindu female she is entitled to a share. *Sheo Narain* v. *Janki Prasad*, I. L. R., 34 All., 505, and *Kanhaiya Lal* v. *Gaura*, I. L. R., 47 All., 127, referred to.

Babuna Kunwar v. Jagat Narain Singh, I. L. R., 50 All. 532

HINDU LAW—*Joint Hindu family—Separation—Ascertainment of shares of members not conclusive evidence of separation—Second Appeal—"Question of law."*] A mere ascertainment of shares of a joint family is not conclusive evidence of separation, but the burden of proving that, notwithstanding the ascertainment of shares of the various members of the family, the family continued to be a joint family lies on the person making the assertion. *Palani Ammal* v. *Muthuvenkatachala Moniagar*, I. L. R., 48 Mad., 254, referred to.

" The proper effect of a proved fact is a question of law." *Dhanna Mal* v. *Moti Sagar*, I. L. R., 8 Lahore, 573, followed.

Beti *v.* Sikhdar Singh, I. L. R., 50 All. 180

HINDU LAW—*Mitakshara—Succession—Sapindas—Exclusion of grand-nephew by nephew.*] According to the Hindu law of succession of the Mitakshara school, as between a nephew and a grand-nephew (son of the nephew's brother) there is no representation, but the nephew will take the whole of the uncle's property to the exclusion of the grand-nephew.

Buddha Singh v. *Laltu Singh*, I. L. R., 37 All., 604, *Khettur Gopal, Chatterjee* v. *Poorno Chunder Chatterjee*, 15 W. R., C. R., 482, *Muttuvaduganatha Tevar* v. *Periasami*, I. L. R., 16 Mad., 11, and *Marudayi* v. *Doraisami Karambian*, I. L. R., 30 Mad., 348, referred to.

Sher Singh *v.* Basdeo Singh, I. L. R., 50 All. ... 904

HINDU LAW—*Jains—Special custom empowering a widow to deal at will with the property of her late husband*—Stridhan.] According to the Hindu law of the *Mitakshara* school, there is no distinction between *stridhan* and "property that a widow can deal with at her pleasure."

In the case of a Jain family, subject in other respects to the law of the *Mitakshara*, a custom was found by which the widow of a separated Jain could deal with the property of her late husband in any way she pleased.

Held that such property was the widow's *stridhan* and was governed by the rules of descent applicable to *stridhan* property.

Debi Mangal Prasad Singh v. *Mahadeo Prasad*, I. L. R., 34 All., 235, *Sheo Shankar Lal* v. *Debi Sahai*, I. L. R., 25 All., 468, *Lakshmi Narain Misir* v. *Musammat Sumarti Kunwar*,

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I. L. R., 46 All., 439, *Shee Singh Rai* v. *Dakho*, I. L. R., 7 All., 688, and *Ram Kali* v. *Gopal Dei*, I. L. R., 48 All., 618, referred to.

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LEGAL NECESSITY, *See* Hindu law 823

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LETTERS PATENT, SECTION 10—*Amendment of—Rules framed in consequence of amendment—Appeal—Limitation—Extension of time.*] A rule of limitation is a rule of procedure and, unless something special in it justifies a contrary inference, governs all proceedings from the moment of its enactment, even though the cause of action may have accrued before the rule came into existence. *Soni Ram* v. *Kanhaiya Lal*, I. L. R., 35 All., 227, referred to.

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MATH—*Dasnami Goshains—Succession—Custom of the order—Alienations made by a* mahant—*No presumption of property being trust property.*] According to the custom of the order of ascetics known as *Dasnami Goshains*, when once a person has been received into

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the order, no tie of relationship remains between him and his natural relations, and neither can succeed to the private property of the other. *Ramdhan Puri* v. *Dalmir Puri*, 2 Indian Cases, 885, followed.

The rules of succession and devolution prevailing in a particular *math* are governed by the particular customs which apply to it.

Properties belonging to a *math* of the order of *Dasnami Goshains* had descended from *guru* to *chela* for several generations, but from 1874 to 1922 the *mahant* of the *math* had been exercising rights of private ownership over some of them by making usufructuary mortgages. There was no reliable evidence that the properties so alienated were trust properties. *Held*, that there was no legal presumption that these properties were trust properties, and such alienation could not be contested by a *chela* of the *guru* who had made them. *Indar Singh* v. *Fatch Singh*, I. L. R., 1 Lah., 540, distinguished.

Goshain Sheo Ghulam Puri v. Shiam Lal Bhagat, I. L. R., 50 All. 485

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MORTGAGE—*Prior and subsequent incumbrances—Right of purchaser to set up the prior mortgage which he has paid off against the second mortgagee—Presumption of intention—Mortgage by guardian of minor without necessary sanction—Act No. VIII of* 1890 (*Guardians and Wards Act*), *section* 30—*Civil Procedure Code, order XLI, rule* 33.] The certificated guardian of her minor son mortgaged, without obtaining the sanction of the District Judge, certain shares belonging to both in two villages, *NR* and *A*. These were subject to a prior mortgage. Subsequently the shares in *NR* were sold, with the sanction of the District Judge, and there was left with the purchasers a sufficient amount of the purchase money to pay off both the mortgages. The purchasers paid off the first mortgage, but not the second. The second mortgagee then sued on his mortgage, and the purchasers set up their rights under the first mortgage as a defence. They also pleaded that the second mortgage, having been made without the sanction of the District Judge, was invalid.

Held (1) that in the circumstances the purchasers were not entitled to set up the first mortgage as a shield against the second mortgagee's claim, inasmuch as their intention, at the time of their purchase, was clearly to discharge and extinguish all the incumbrances on the property, *Gokaldas Gopaldas* v. *Puranmal Premsukhdas*, I. L. R., 10 Calc., 1035, *Muhammad Sadiq* v.

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Ghaus Muhammad, I. L. R., 33 All., 101, and *Makkhan Lal* v. *Natthi*, 21 A. L. J., 382, referred to;

(2) that the purchasers were not estopped from questioning the validity of the second mortgage so far as it affected the minor's share, but if they did so, they were bound to make restitution to the extent that the minor had benefited by the mortgage money. *Nur Bakhsh* v. *Rukum Singh*, 8 A. L. J., 754, followed;

(3) that the guardian's share in the property covered by the second mortgage was liable, and

(4) that, although the mortgagee had not appealed against the decree of the lower appellate court so far as it dismissed his claim altogether as against village *A*, it was nevertheless open to the High Court, while modifying the decree of the lower appellate court in favour of the defendants appellants, to give the plaintiff respondent a decree as against the guardian's share in that village also, in view of order XLI, rule 33, of the Code of Civil Procedure. *Rangam Lal* v. *Jhandu*, I. L. R., 34 All., 32, followed. *Mahomed Khaleef Shirazi* v. *Les Tanneries Lyonnaises*, I. L. R., 49 Mad., 435, distinguished.

Maqsud Ali Khan *v.* Abdullah Khan, I. L. R., 50 All. ... 218

MORTGAGE—*Redemption—Mortgaged property sold for arrears of rent which the mortgagee was bound to pay—Purchase by mortgagee—Equity of redemption not lost.*] The mortgagee of a fixed-rate holding, who was under a covenant to pay the rent of the holding to the zamindar, made default in such payment, in consequence of which the holding was sold, and it was purchased by the mortgagee himself. *Held*, that the mortgagee could not by his own wrongful act deprive the mortgagor of his rights, and the mortgagor's equity of redemption still subsisted. *Nawab Sidhe Nazur Ally Khan* v. *Rajah Ojoodhyaram Khan*, 10 Moo., I. A. 540, *Kalappa bin Giriappa* v. *Shivaya bin Shivlingaya*, I. L. R. 20 Bom., 492, and *Babaji* v. *Magniram*, I. L. R., 21 Bom., 396, referred to.

Jaikaran Singh v. Sheo Kumar Singh, I. L. R., 50 All. 86

MORTGAGE—*Suit for sale—Limitation—"Notice"—Act No. IX of 1908 (Indian Limitation Act), schedule I, article 132.*] A simple mortgage, executed on the 1st of May, 1909, for a term of three years, contained a stipulation to the effect that, if the mortgagor transferred the mortgaged property, the mortgagee would be at liberty to sue before the expiry of the term. On the 8th of March, 1911, the mortgagor stood surety for one Ali Raza in the amount of Rs. 50, and hypothecated a small share in the property covered by the deed of 1909. No actual notice of this transaction was given to the first mortgagee. A suit was filed on the mortgage of 1909 on the 27th of March, 1924, and the plea of limitation was set up by the defendants.

Held that the suit was within time. No actual notice of the hypothecation of 1911 had been given to the plaintiff mortgagee, and in the circumstances there was no legal duty cast on the mortgagee of 1909 to keep on searching the registers for further dealings of the mortgagor with the property comprised in his mortgage.

Shib Dayal v. *Meharban*, I. L. R., 45 All., 27, and *Pancham* v. *Ansar Husain*, I. L. R., 43 All., 596, followed. *Nathi* v. *Tursi*, I. L. R., 43 All., 671, *Mata Tahal* v. *Bhagwan Singh*, 19 A. L. J., 406, and *Gaya Din* v. *Jhumman Lal*, I. L. R., 37 All., 400, referred to.

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Meaning of "notice," actual or constructive, discussed. *Barnhart* v. *Greenshields*, 9 Moo., P. C., 18, *Hewitt* v. *Loosemore*, 9 Hare, 449, *Janki Prasad* v. *Kishen Dat*, I. L. R., 16 All., 478, and *Tilakdhari Lal* v. *Khedan Lal*, I. L. R., 48 Calc., 1, referred to.

Ashiq Husain v. Chatarbhuj, I. L. R., 50 All. ... 328

MOTOR VEHICLE, *See* Act No. VIII of 1914, sections 6, 8, 9 and 16 ... 876

MUHAMMADAN LAW—*Dower—Widow's lien—Act No. I of 1877 (Specific Relief Act), section 9—Remedy of widow, if dispossessed.*] The lien of a Muhammadan widow over property, on account of her dower debt, only operates so long as she remains in possession of the property. On being deprived of possession, she has a right, independently of her lien, to recover possession within six months under the Specific Relief Act. The lien gives her no title, or right to recover possession, but only a right to retain possession. *Ali Bakhsh* v. *Allahdad Khan*, I. L. R., 32 All., 561, approved. *Azizullah Khan* v. *Ahmad Ali Khan*, I. L. R., 7 All., 353, referred to.

Mashal Singh v. Ahmad Husain, I. L. R., 50 All. ... 86

MUHAMMADAN LAW—*Dower—Nature of widow's possession in lieu of dower.*] The right of a Muhammadan widow is founded on her power as creditor for her dower, to hold the property of her husband, of which she has lawfully and without force or fraud obtained possession, until her debt is satisfied. But it does not follow from this that unless and until the widow actually enters into possession of the estate on the express assertion that she is taking possession in lieu of her dower debt, she cannot subsequently be allowed to raise such plea. *Musammat Bebee Bechan* v. *Sheikh Hamid Hossein*, 11 Moo. I. A., 377, *Ali Bakhsh* v. *Allahdad Khan*, I. L. R., 32 All., 651, and *Ramzan Ali Khan* v. *Asghari Begam*, I. L. R., 32 All., 563, followed.

Muhammad Shoaib Khan v. Zaib Jahan Begam, I. L. R., 50 All. 423

MUHAMMADAN LAW—*Pre-emption* Shafi khalit—*Ownership of tree with overhanging branches—Plot divided by* kachcha *road over which the public had a mere right of way without ownership of the soil.*] In a suit for pre-emption under the Muhammadan law the property sold consisted of undivided shares in a plot of land adjoining the plaintiff's house. This plot was divided by a *kachcha* road over which the public had a right of passage, but the land of the road was not public property.

Held that the plaintiff was entitled to pre-empt the whole plot, and not merely the portion on his side of the *kachcha* road.

Held also that the fact that the branches of a tree project over the land of a neighbour does not give the owner of the tree any right as a *shafi khalit*.

Hari Krishna Joshi v. *Shankar Vithal*, I. L. R., 19 Bom., 420, and *Abdul Shakur* v. *Abdul Ghafur*, 7 A. L. J., 641, referred to.

Aziz Ahmad v. Nazir Ahmad, I. L. R., 50 All. ... 257

MUHAMMADAN LAW—Shias—*Marriage*—Shia *girl married to a* Sunni *—Consent of bride—Presumption as to age of puberty—Guardian* ad litem*—Costs.*] According to the Muhammadan law applicable to the *Shia* sect, a girl is of full age when she attains the age of puberty, and, in the absence of direct evidence, there is a presumption that that event would occur between the ages of nine and ten years.

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Where, therefore, a *Shia* girl of the age of nearly thirteen years was married, with the consent of her father, but without her own, to a boy who was a *Sunni*, and before she attained the age of twenty-one years, she sued to have the marriage declared illegal and not binding on her, it was *held* that she was entitled to the decree asked for: the consent of the father could not in the circumstances take the place of the consent of the girl herself. *Newab Mulka Jehan Sahiba* v. *Mahomed Ushkurree Khan*, 26 W. R., C. R., 26, followed.

There is no authority in the Code of Civil Procedure to award costs personally against a guardian *ad litem*. *Narasimha Rau* v. *Lakhsmipati Rau*, I. L. R., 3 Mad., 263, followed.

Sibt Ahmad *v.* Amina Khatun, I. L. R., 50 All. ... 733

MUHAMMADAN LAW—Waqf—Waqf *not invalid for the sole reason that the first* mutawalli *is a minor.*] A *waqf*, otherwise valid, will not fail for the sole reason that the *mutawalli* appointed by the *waqif* is a minor. *Piran* v. *Abdool Karim*, I. L. R., 19 Calc., 203, *Muhammad Nasim* v. *Muhammad Ahmad*, 27 Indian Cases, 389, *Khatun Begam* v. *Riaz Ahmad*, 15 A. L. J., 132, and *Raza* v. *Ali*, I. L. R., 40 Mad., 941, referred to.

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PRE-EMPTION, *See* Muhammadan law 257

PRE-EMPTION—*Decree conditioned on payment of purchase-money within specified period of its becoming final—Meaning of "final."*] *Held* that an appealable decree against which an appeal has not been filed becomes final on the expiry of the period of limitation prescribed for filing an appeal, and not from the day on which it was passed. *Hingan Khan* v. *Ganga Prasad*, I. L. R.,

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1 All., 293, and *Narain Das* v. *Lachman Singh*, I. L. R., 3 All., 135, dissented from. *Disa Singh* v. *Jaula Singh*, Weekly Notes, 1881, p. 165, *Shaikh Ewaz* v. *Mokuna Bibi*, I. L. R., 1 All., 132, *Ram Sahai* v. *Gaua*, I. L. R., 7 All., 107, *Gopal Das* v. *Mamma Kunwar*, 5 A. L. J., 136, and *Fazal Husain* v. *Fazal-ud-din*, I. L. R., 47 All., 539, followed.

Sanoman Singh v. Raja Ram, I. L. R., 50 All. ... 68

PRE-EMPTION—*Suit for pre-emption by three plaintiffs—Suit dismissed—Appeal—Death of one plaintiff appellant pending appeal——Abatement—Custom—Effect of estate coming into the hands of a single proprietor.*] A suit for pre-emption was filed by three persons, each claiming a right to pre-empt the whole of the property sold. The suit was dismissed. The plaintiffs appealed, but, pending the appeal, one of them died, and his representatives were not brought upon the record within the period of limitation.

Held, that the effect of this was not that the appeal abated but that the deceased plaintiff appellant merely dropped out, and the other two plaintiffs were entitled to continue the appeal and, if they succeeded, to obtain a decree for pre-emption. *Mathar Singh* v. *Abbai Nandan Prasad*, I. L. R., 49 All., 756, *Ambika Prasad* v. *Jhinak Singh*, I. L. R., 45 All., 286, and *Wajid Ali Khan* v. *Puran Singh*, I. L. R., 47 All., 100, overruled.

When once property comes into the hands of a single proprietor, any custom of pre-emption relating thereto must come to an end. The custom may grow up again, but its growth will have to be established by evidence. *Kanar-un-nissa Bibi* v. *Sughra Bibi*, I. L. R., 39 All., 480, followed.

Mahadeo Singh v. Talib Ali, I. L. R., 50 All. ... 792

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PRINCIPAL AND AGENT—*Forged bill presented by agent—Liability of principal.*] Plaintiff and defendant had dealings together and the defendant was in the habit of paying to the plaintiff's servants. One of the plaintiff's servants presented a bill, on which the defendant paid. The bill was afterwards found to be a forgery.

Held, that the plaintiff was liable to make good the amount paid by the defendant. *Barwick* v. *English Joint Stock Bank*, L. R., 2 Exch., 259(266), followed.

Partab Narain v. The Jute Mills, I. L. R., 50 All. ... 29

PRINCIPAL AND SURETY, *See* Act No. IX of 1872, section 134 ... 211

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PRIOR AND SUBSEQUENT INCUMBRANCES, *See* Mortgage 218

PRIVACY—*Existence of public lane between houses of parties not incompatible with existence of right.*] The fact that there is a public lane between the two houses concerned is not incompatible with the existence of a right of privacy. *Kuvarji Premchand* v. *Bai Javer*, 6 Bom. H. C. R., 143, *Jamil-ud-din* v. *Abdul Majeed*, 13 A. L. J., 361, *Fazal Haq* v. *Fazal Haq*, 26 A. L. J., 49, and *Gokul Prasad* v. *Radho*, I. L. R., 10 All., 358, followed.

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PRIVY COUNCIL PRACTICE, *See* Criminal Procedure Code, section 439 (4) 722

PROBATE, *See* Act No. VI of 1881, section 3 314

PROCEDURE, *See* Act No. XLV of 1860, section 194 365

PROCEDURE, *See* Act No. VII of 1870, section 4 980

PROCEDURE—*Appeal—Change of law pending suit—Law by which the right of appeal will be governed.*] A right of appeal in a suit is governed by the law prevailing at the date of the institution of the suit, and not by the law prevailing at the date of the decision of the suit or at the date of the filing of the appeal. *The Colonial Sugar Refining Company Ltd.*, v. *Irving*, [1905] A. C., 369, *Delhi Cloth and General Mills Co., Ltd.*, v. *Income-tax Commissioner*, I. L. R., 9 Lah., 284, *Daivanayaka Reddiyar* v. *Renukambal Ammal*, I. L. R., 50 Mad., 857 and *Bala Prasad* v. *Shyam Behari Lal* 26 A.L.J. 406. followed. *Zamin Ali Khan* v. *Genda*, I. L. R., 26 All., 375, overruled.

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SUIT FOR MALICIOUS PROSECUTION—"*Want of reasonable and probable cause*"—*Bearing of the findings of the Criminal courts on the subsequent civil suit for damages.*] In suits for malicious prosecution, where the facts contained in the plaint are professedly within the personal knowledge of the complainant, the mere fact that the first criminal court believed the complainant's statement and convicted the accused would not be any evidence of the existence of reasonable and probable cause, if the appellate court comes to a contrary conclusion. The judgements of the criminal courts are conclusive for the purpose of showing that the prosecution terminated in favour of the plaintiff, but it is doubtful if the findings of the criminal courts by themselves are any evidence of malice or want of reasonable and probable cause : it is for the civil court to go into all the evidence and decide for itself whether such malice or want of reasonable and probable cause existed or not. *Shama Bibee* v. *Chairman of Baranagore Municipality*, 12 C. L. J., 410, distinguished. *Padarath* v. *Dulam*, 10 A. L. J., 423, *Radhe Lal* v. *Munnoo*, 11 A. L. J., 125, and *Madho Singh* v. *Mangal Singh*, 79 Indian Cases, 1023, followed. *Jadubar Singh* v. *Sheo Saran Singh*, I. L. R., 21 All., 26, and *Balbhaddar Singh* v. *Badri Sah*, I. L. R., 1 Luck., 215, referred to.

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ZAMINDAR AND TENANT—*Co-parcenary mahal—Position of co-parcener not incompatible with that of a tenant.*] There is nothing in law to prevent a co-sharer in a co-parcenary mahal from having tenant rights of any kind and being liable to the payment of rent either to another co-sharer or to the general body of co-sharers, and if a tenant subsequently acquires proprietary rights in the land, his tenancy does not automatically come to an end in its entirety. *Mahabir Singh* v. *Ahsanullah*, Weekly Notes, 1901, p. 53, *Abul Hasan Khan* v. *Bhura*, Weekly Notes, 1906, p. 226, and *Jamna Prasad Rai* v. *Damri*, Vol. I, Unpublished Decisions of the Board of Revenue, p. 77, followed.

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